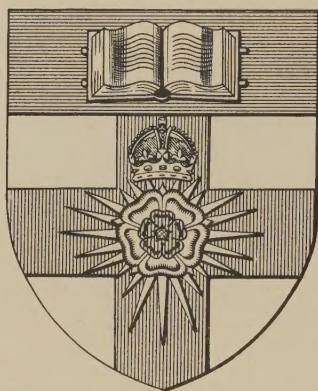


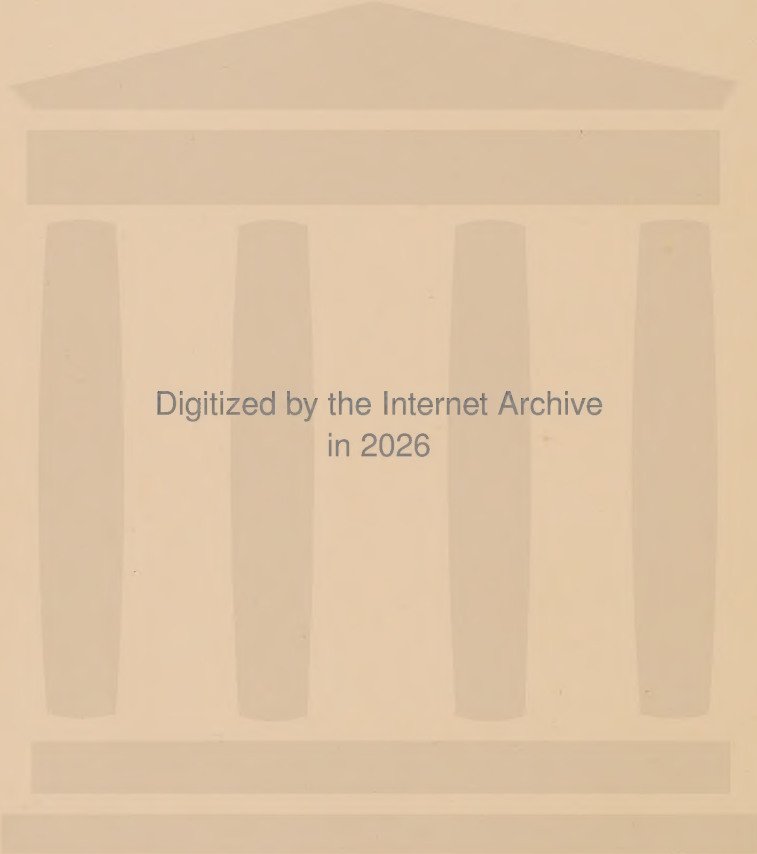
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 DETERMINED BY THE
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COURT OF APPEAL
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 AND BY THE
ECCLESIASTICAL COURTS

LISSACK *v.* LISSACK (BY HIS GUARDIAN).

Husband and wife—Divorce—Cruelty—Insanity—Child of marriage killed—Husband found guilty of murder but insane.

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 May 24,
 25, 26.
 Pearce J

Insanity is not a defence to a charge of cruelty. In petitions based on cruelty the action of the court in interfering in the marriage is intended not to punish the guilty party for the past, but to protect the innocent party for the future; and the question for the court to decide is whether the innocent party can with safety to life and health live with the guilty.

Where, therefore, a wife alleged that her husband had killed the only child of the marriage and attempted to kill himself immediately thereafter, and that he was thereby guilty of cruelty, and in his answer the husband pleaded that if he had been guilty of any such acts he knew neither their nature nor their quality nor that they were wrong, and that he was not responsible for them:—

Held (the killing and attempt at suicide being proved), that the defence of insanity was not open to the husband, and that the wife was entitled to a decree, for such a defence to a petition based on cruelty was not in accord with the true view of the law relating to cruelty. To withdraw from the ambit of legal cruelty, because it was due to insanity, conduct which was intolerable would be to make the court powerless to help in cases where help might be most needed.

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Held, further, that, even if insanity could be a defence to a charge of cruelty, the onus of proving it must be on the respondent; and on the facts the husband had failed to discharge that onus.

Defended petition for divorce.

The wife petitioner married her husband, the respondent, in 1941, and there was one child of the marriage, a daughter, born in 1942. On October 25, 1948, the wife went out for the evening, leaving the child in her husband's charge. On her return she found the kitchen barricaded, and when she got in she found that the child had been strangled and that her husband had made an attempt to commit suicide by putting his head in the gas oven. In a subsequent signed statement to the police, which began: "I want to tell you how I came to do this terrible thing", the husband admitted that he had made up his mind some weeks before October 28 to kill the child, and stated that he had creeping paralysis, brought about by his habits, that the disease was hereditary, and that he had passed it on to his daughter. He said that he had decided not to leave her with such a complaint, and had made up his mind to kill her and himself. His statement described in detail how he had killed the child, and referred to a note which he had written in anticipation. In that note he stated: "The reason for this terrible thing is all through my wickedness. If Barbara [the child] had lived she would have been blind and paralytic inherited through me. What kind of life would that have been for her and Rosie and everybody else concerned with our darling. A fine son I've turned out to be, and what a terrible thing to do to a wonderful girl like Rosie. Please God let my darling wife find happiness again". In a letter written from prison on November 5, 1948, to his wife's brother he said: "After what I have done to Rosie I can hardly face her. . . . I know what torment, misery and agony she is going through for she is constantly in my thoughts . . .". He referred to the suffering of his parents, and concluded: "There doesn't seem much more I can say except that I've messed up a lot of decent people's lives".

On November 17, 1948, he was tried for murder at the Central Criminal Court and found guilty but insane and so not to be responsible according to law for his actions at the time. It was ordered that he be kept in custody as a criminal lunatic, and he was in Broadmoor when the petition for divorce was heard. From Broadmoor he wrote in December, 1948, two letters to his wife regretting the pain which he had caused her and the "terrible things" which he had done.

The husband was not incurably insane; his condition had improved, and it was possible that he might in the future be released.

Tyndale K.C. and *Thomas Dewar* for the wife.

Stuart Horner for the Official Solicitor as guardian ad litem to the husband.

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The arguments of counsel and the cases cited by them are referred to in the judgment.

PEARCE J. stated the facts and continued: The medical evidence shows clearly that, as one would suppose, the shock has had a very serious effect on the wife's health and nerves, that some part of that damage will be permanent, and that some mental relief would be afforded to her by a release from her marriage tie to the husband. Apart from the question of insanity the wife has a clear right to the relief which she claims. There can be no greater cruelty to a woman than the killing of her child. Does this insanity prevent her obtaining relief?

Mr. Tyndale, for the wife, argued that insanity of the husband is no defence to a wife's petition based on cruelty. He relied on the following cases, and on the fact that such a defence had in no reported case been successful. In *Kirkman v. Kirkman* (1) Sir William Scott said, when referring to the necessity to provide for the safety and comfort of the individual: "If that safety is endangered by violent and disorderly affections of the mind, it is the same, in its effects, as if it proceeded from mere malignity alone; it cannot be necessary, that, in order to obtain the protection of the court, it should be made to appear to proceed from malignity". In *Holden v. Holden* (2) the same judge made observations tending in the same direction. In *Yarrow v. Yarrow* (3) Butt P., and in *Hyman v. Hyman and Goldman* (4) Jeune P. expressed doubt whether insanity could be a complete answer to a charge of adultery.

In *Hanbury v. Hanbury* (5) Butt P. said in charging the jury (6): "I am not entirely satisfied that a mere plea of insanity is a sufficient answer to a suit. It may be that a person is so insane as to necessitate his or her confinement in an asylum or some other place of permanent detention, and the disease may be such that there is no hope of recovery or amelioration such as will allow of his or her discharge. When a disease of that sort seizes upon a person, and he or she has to be incarcerated or permanently to be placed in confinement, I should hesitate to say that in regard to an act committed in such a state of insanity a plea of insanity might not be an answer. But I think it is very different with regard to intermittent and

(1) (1807) 1 Hagg. Con. 409, 410.

(2) (1810) 1 Hagg. Con. 453, 458.

(3) [1892] P. 92, 94.

(4) [1904] P. 403, 407.

(5) [1892] P. 222.

(6) Ibid., 224.

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“ recurrent insanity. If a man is afflicted with madness or
 “ insanity of such a nature as to necessitate keeping him in duress
 “ for the rest of his life, there is no danger of violence to his wife.
 “ I conceive that the object of the Divorce Act is not so much,
 “ or nearly so much, the punishment or retribution for a marital
 “ offence as the protection of the party who is in peril. I believe
 “ that protection, and not punishment or retribution, is the main
 “ object; and if it can be shewn that the insanity is of such a
 “ nature that it will produce violence on the part of the husband,
 “ and endanger the safety of the wife, though it need not entail
 “ the permanent incarceration of the man, but only his restraint
 “ from time to time—if the mania is recurrent and comes on sud-
 “ denly from time to time she may be placed in great jeopardy.
 “ In such a case I can well conceive that, although in some
 “ instances insanity may be one of those misfortunes which must
 “ be taken by a wife with her husband for better or for worse,
 “ and though it may assume the form of a disease, yet if it is
 “ such as to imperil the wife’s safety she is entitled to the pro-
 “ tection of this court. Assuming for a moment that these
 “ attacks were not brought on the respondent by his own self-
 “ indulgence, assuming that they were the result of hereditary
 “ disease, I should still be disposed to hold that acts of cruelty
 “ committed in one of these fits of mania would entitle the wife
 “ to the remedy which she asks—separation from her husband.
 “ If the mania is intermittent and recurrent, the husband is
 “ entitled to go home when he recovers from time to time—the
 “ wife cannot refuse him admission to the conjugal home; and if
 “ the mania is likely to recur accompanied with violence which
 “ would place the wife in peril, the ordinary protection which she
 “ is supposed to obtain by proceedings in lunacy is a delusion,
 “ because it does not protect her against the return home of her
 “ husband, who is liable at any moment to become a lunatic ”.

That case came before the Court of Appeal. Lord Esher M.R.
 (with whom Lindley L.J. and Kay L.J. concurred) said (7):
 “ he was prepared to lay down as the law of England that when-
 “ ever a person did an act which was either a criminal or a cul-
 “ pable act, which act, if done by a person with a perfect mind,
 “ would make him civilly or criminally responsible to the law,
 “ if the disease in the mind of the person doing the act was not
 “ so great as to make him unable to understand the nature and
 “ consequences of the act which he was doing, that was an act
 “ for which he would be civilly or criminally responsible to the
 “ law. Consequently, even though the respondent’s mind was
 “ diseased, he was as responsible to the law as if his mind was
 “ not diseased. The judgment of the learned President was

"therefore right. There was a larger question which the President touched upon, but did not decide—namely, whether, even if the respondent's mind had been such that he did not know the nature of what he was doing or that he was doing wrong, the petitioner would or would not be entitled to a divorce. It was unnecessary to decide that question, and he desired to leave it open".

In a Scottish case, *M'Lachlan v. M'Lachlan* (8), Lord Moncreiff, Lord Carmont, and Lord Russell held that an act committed by an epileptic during a seizure when he was temporarily irresponsible constituted cruelty. They came to that conclusion after a careful consideration of the law of Scotland and England.

Finally, Mr. Tyndale relied on a judgment of Denning L.J. in *White v. White* (9), where he has cogently and in detail considered the matter and expressed the opinion that insanity is no defence to a charge of cruelty, with a possible qualification (10) when the insanity is known to the injured party.

Mr. Stuart Horner, for the husband, contended that in the passages cited in *Kirkman v. Kirkman* (11) and *Holden v. Holden* (12) Sir William Scott was directing his mind not to insanity, but to intention; that he was dealing with lack of balance rather than madness. He also argued that in *Hanbury v. Hanbury* (13) the President was really saying that there was a degree of insanity which could be an answer, but that it must be of a certain degree; though it is to be noted that he appeared to consider that cruelty committed in recurrent fits of mania would entitle a wife to a judicial separation. Mr. Horner argued, rightly, that *Yarrow v. Yarrow* (14) and *Hyman v. Hyman and Goldman* (15) were neutral and left the matter completely in doubt. He relied on *Hall v. Hall* (16) where Sir Creswell Creswell said: "With danger to the wife in view, the court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial. Thus, I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from 'violent and disorderly affections', as said in one case, or from 'violence of disposition, want of moral control, or eccentricity', as said in another, or 'from a liability to become excited in controversy', in the language of a third; but madness, dementia, positive disease of the mind, this is quite another matter. An insane man is likely enough to be dangerous to his wife's personal

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(8) 1945 S. C. 382.

(9) [1950] P. 39, 56.

(10) *Ibid.*, 60.

(11) 1 Hagg. Con. 409, 410.

(12) 1 Hagg. Con. 453, 458.

(13) [1892] P. 222.

(14) [1892] P. 92.

(15) [1904] P. 403.

(16) (1864) 3 Sw. & Tr. 347, 349.

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“ safety, but the remedy lies in the restraint of the husband, not the release of the wife. Though the object of the court’s interference is safety for the future, its sentence carries with it some retribution for the past. In either aspect it would be equally unjust to act on the excesses of a disordered brain: in the latter, for the insane are not responsible; in the former, for insanity may be cured and the danger at an end ”.

Mr. Horner pointed out that in *M’Lachlan v. M’Lachlan* (17) one of the judges appeared to regard certifiable insanity as an answer to cruelty. In *Astle v. Astle* (18), Henn Collins J. held that insanity which would satisfy the test in *M’Naghten’s* case (19) was an answer. That opinion was not necessary to the decision, as he found cruelty proved and gave the wife a decree. And, moreover, the Court of Appeal has disapproved of part of the reasoning in that case in *Squire v. Squire* (20). It is not, therefore, a safe guide. So, too, with *Kellock v. Kellock* (21), decided at the same time by the same judge. He further relied upon the judgment of Asquith L.J. in *White v. White* (22). In that case Bucknill L.J. held that the judge of first instance was wrong in refusing a decree on the ground of insanity and that the wife was responsible for her acts, and he decided that a decree to the husband should be granted. Although in arriving at the decision he applied the test laid down in *M’Naghten’s* case (23), he expressly left open (24), without giving an opinion either way, the question whether insanity could be a defence to a charge of cruelty. Asquith L.J., in agreeing with Bucknill L.J., held (25) that, to afford a defence the respondent’s “ insanity must, at all events, not fall short of such insanity as would afford a defence to a criminal charge within the *M’Naghten* rules ” (26). He added (27): “ It is unnecessary in the present case, having regard to the view I take of the facts, to decide whether the converse holds, namely, that if the respondent does not know what he is doing, or does not know it is wrong, this is in any or every case a defence, though for myself I incline to that view.” He then gave reasons for that view.

Denning L.J. agreed with the other Lords Justices in allowing the appeal and in granting a decree (28), but he did so for different reasons. He held that insanity was no defence, with the possible exception (29) of cases where the injured party knew that the other was of unsound mind; and he held that the

(17) 1945 S. C. 382.

(18) [1939] P. 415.

(19) (1843) 10 Cl. & Fin. 200, 210.

(20) [1949] P. 51.

(21) [1939] 3 All E. R. 972.

(22) [1950] P. 39, 51.

(23) 10 Cl. & Fin. 200, 210.

(24) [1950] P. 51.

(25) [1950] P. 52.

(26) 10 Cl. & Fin. 200.

(27) [1950] P. 53.

(28) Ibid. 56-60.

(29) Ibid. 60.

M'Naghten rules (30) were not applicable. That view was necessary to his decision since in his opinion the respondent was insane within the *M'Naghten* rules (30) and, had such insanity been a possible defence, there could have been no decree.

The matter comes before me in this difficult state of the law. It is for the husband to establish that a legal defence of insanity does exist in matrimonial cases. Although such a defence has never been successfully and affirmatively held to exist in any reported case, it has been assumed to exist in some of the cases cited; but that assumption was not necessary to the decisions. In criminal matters, where the object is punishment, such a defence is obviously necessary in a just society. So, too, in a more limited form, at common law and in chancery. But I do not think it a safe analogy to assume that justice therefore requires it in matrimonial matters.

Since in petitions based on cruelty the court's duty to interfere is intended not to punish the husband for the past, but to protect the wife for the future, the question for the court is whether the wife can with safety to life and health live with the husband now. To withdraw from the ambit of legal cruelty conduct that is intolerable, but is due to insanity, is to make the court powerless to help in cases where help may be most needed. It is said that the other course may also cause hardship. Theoretically it might: if a husband is cruel to his wife owing to insanity and then recovers, it is hard for him that he should be divorced by her; but since, *ex hypothesi*, her affection and fortitude were not great enough to enable her in the circumstances to tolerate a continuance of married life and she wishes for divorce, it is unlikely that he would have secured happiness by maintaining the marriage tie. Moreover, since such a defence has in no reported instance ever been made out on the facts, its existence would seem to give little practical benefit to respondents.

These considerations and the reasons set out in the judgment of Denning L.J. seem to me convincing. Among many conflicting opinions on the subject, I cannot find that it has been clearly established that insanity is a defence to a petition based on cruelty. For that reason, and because in my view such a defence is not in accord with the true view of the law relating to cruelty, I hold that the defence of insanity is not open to the husband and that the wife is entitled to a decree.

In case I am held to be wrong in this view, it is desirable that I should express my opinion whether the necessary degree of insanity has been proved in this case. If insanity can be a defence, the onus of proving it must be on the respondent. The test suggested is that laid down in *M'Naghten's* case (30) as the

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proper test in criminal cases, namely, "to establish a defence " on the ground of insanity, it must be clearly proved that, at " the time of the committing of the act, the party accused was " labouring under such a defect of reason, from disease of the " mind, as not to know the nature and quality of the act he was " doing; or, if he did know it, that he did not know he was doing " what was wrong ".

The test whether he knew that he was doing wrong is a very unsatisfactory one in measuring misdeeds so dependent on the circumstances and personalities of the parties as acts of cruelty. Acts may be cruel in particular circumstances and between particular persons that are not at the time of their commission known to be wrong. To alter the test by substituting for the word " wrong " the word " cruel " would not be possible in view of the decision of the Court of Appeal in *Squire v. Squire* (31). This in itself shows how unsatisfactory is such a test. To limit the test so that it accords with that applied in common law and chancery courts would make it more practical. Halsbury's Laws of England (2nd ed.), vol. 21, p. 293, § 504, quoted by Bucknill L.J., in *White v. White* (32), reads as follows: " In an " action at common law or in chancery, where the responsibility " of a person alleged to be of unsound mind is in question, the " issue generally directed is, ' was the person alleged to be of " ' unsound mind at the date in question capable of understand- " ' ing the nature of the act he was performing? ' " Such a limitation of the test would be reasonable, since the test of the knowledge of wrong, though suitable to criminal matters where the primary object is punishment, is not suitable in matrimonial matters, where it would be out of accord with the authorities which I have already cited. In this case it is agreed that the husband knew the nature and quality of his acts. If, therefore, that limited test were applied in this case, the wife would succeed.

Even if the test in *M'Naghten's* case (30) were the true one, the husband can only defeat the wife's prayer if he did not know his acts to be wrong. On this issue there is a divergence of medical opinion. I have to decide it on the evidence before me. The opinion formed by a jury—who, incidentally, did not have before them all the evidence that I have had—does not compel me to the same conclusion. The doctor who saw the husband thirty-six hours after the crime, and thereafter from time to time for some three weeks, says that, though he cannot speak with certainty, there is a high degree of probability that, owing to schizophrenia, the husband had no knowledge that his acts were legally or morally wrong. He suggested also that the disease might have created an irresistible impulse to the deed. But

in view of the man's own statement this seems most unlikely. This doctor relies on the complete flatness and absence of emotion displayed by the husband when he examined him, a condition typical of schizophrenia. But it must be remembered that the husband had been through a horrible ordeal, to which, if his statement is to be believed, he had difficulty in screwing up his courage, an ordeal which must have taken heavy toll of his nervous resources. The doctor at Broadmoor said that the husband was certifiable when he entered that institution. The opinion of the doctor called by the wife is that the husband knew that what he was doing was contrary to law and was wrong. That opinion is derived from the man's signed statement and the other documents on which this doctor relies as showing knowledge of wrong and which at all events, as the other doctor admits, give some indication of that knowledge. All the documents show the husband's appreciation of the pain which his acts would inflict, or had inflicted, on the wife. The references in the original note to "this terrible thing" and "what a terrible thing to do" to a wonderful girl like Rosie are more consistent with an appreciation of wrong than with a failure to appreciate it. There is here no glorification of his act, no indifference to its consequences. So, too, with the signed statement made the day after the occurrence, where he explains how he "came to do this terrible thing". So, too, with his difficulty in getting up his courage to do it and in his waiting to do it till his wife went out. So, too, with the contrition expressed in the letters after the event. I am asked to believe that there was an interval between these documents, namely, at the moment of the killing, when the knowledge of wrong passed from his mind. But if, as I believe, when he first planned the deed and wrote the note, he knew that it was wrong, yet determined to do it if he could muster the courage, and if, as I believe, when he made his signed statement shortly after the event (and later when he wrote the letters) he knew it to be wrong, I find it impossible to assume an intervening interval when he did not know it to be wrong. The evidence of the doctor called by the wife seems to me the more likely to be correct; but, at the highest, the matter is one of opinion and probability.

I have to consider whether the husband has proved clearly that he did not know that it was wrong. I am satisfied that on the evidence he has not proved that clearly, or at all. This case seems to me very similar to that considered in the fourth question in *M'Naghten's* case (33); and, since the husband's conduct, even if the delusions had been true, would have been unlawful, he

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cannot escape liability for that conduct. There will be a decree nisi in favour of the wife.

I should like to add that I am much indebted to Mr. Tyndale and Mr. Dewar for the care and thoroughness with which they have presented the arguments for the wife, who petitions as a poor person; and also to Mr. Stuart Horner for the care and fairness with which he has conducted this case on behalf of the Official Solicitor.

Decree nisi.

Solicitors: *T. C. Boyes*, the Law Society, Services Divorce Department; *The Official Solicitor*.

J. B. G.

In re R., DECEASED.

1950

April 18, 19;
May 12.

Willmer J.

Probate—Procedure—Want of knowledge and approval—Allegations in substance of the case—Summons to strike out—R.S.C. Ord. 19, rr. 25A, 27—Contentious Probate Rules, 1862, r. 40A.

The defendants in a probate action alleged, inter alia, that, at the time when the will purported to have been executed, the deceased did not know or approve of its contents; and under that heading they made allegations concerning the relationship between the beneficiary and the deceased in the substance of the case which the plaintiffs applied to have struck out under R.S.C. Ord. 19, r. 27. The plaintiffs contended that, whereas those allegations might be relevant on a question of testamentary capacity, or on an issue of undue influence, they could not be relevant, or admissible in evidence, in relation to the question of knowledge and approval.

Held, that the allegations to which objection had been taken, not being connected in any way with the preparation and execution of the will, were not relevant to the issue of want of knowledge and approval, and, being of a scandalous nature, and such as might tend to prejudice the fair trial of the action, should be struck out; for, where a question was raised of knowledge and approval of the contents of a will, the circumstances held to excite the suspicions of the court must be circumstances attending, or at least relevant to, the preparation and execution of the will itself. Moreover, if it were intended to allege undue influence, such an allegation should be pleaded in plain and unambiguous terms.

Barry v. Butlin (1838) 2 Moo. P. C. 480, *Fulton v. Andrew* (1875) L. R. 7 H. L. 448, *Tyrrell v. Painton* [1894] P. 151, *Low v. Guthrie* [1909] A. C. 273, 281, and *Davis v. Mayhew* [1927] P. 264 applied.

Held, further, that the allegations were also in direct contravention of r. 40A of the Contentious Probate Rules, 1862 (as amended

in 1865), whereby "... Any party pleading [want of knowledge " and approval] shall therewith ... deliver to the adverse party "... particulars in writing, stating shortly the substance of the " case ...; and no defence shall be available thereunder which " might have been raised under any other of the said pleas, unless " such other plea be pleaded therewith"; that r. 40A had not been superseded by R.S.C. Ord. 19, r. 25A; and that, since the allegations might have been raised under a plea of testamentary incapacity, or of undue influence, it was not open to the defendants, under the rules, to raise them on a plea of want of knowledge and approval.

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McLeod v. Shrewsbury (Earl) [1922] P. 112 followed.

PROBATE SUMMONS (adjourned into court).

The following statement of facts is taken from the judgment:—

The plaintiffs in the action were the executors under the will made by the deceased in December, 1946, and claimed to have the will established. The sole beneficiary under the will was not related in any way to the deceased, but was in fact the son of a local inn-keeper. The defendants were the lawful brothers of the deceased, and by their defence they attacked the will on three grounds. First, they put the plaintiffs to proof that the will was duly executed in accordance with the Wills Act, 1837. Secondly, they alleged that at the time of making the will the deceased was not of sound mind, memory and understanding. They alleged in the substance of the case under that heading that during the latter years of his life the deceased was a chronic alcoholic, with the result that his intellect was weakened and his memory became defective. No question turned on that allegation for the purposes of the application. Thirdly, the defendants alleged that at the time when the will purported to have been executed the deceased did not know and approve of its contents. The present application concerned the allegations made in the substance of the case under that third heading. The allegations which were objected to, and which it was sought to strike out, arose as follows: For some years, it was alleged, before the making of the will the deceased professed and openly boasted of a homosexual attraction to the beneficiary. Allegations were made of conduct on the part of the deceased from which it might have been inferred that acts of intimacy of a homosexual character in fact took place between the deceased and the beneficiary. It was alleged that the deceased had made daily visits to the inn where the beneficiary lived with his parents, and that he there habitually indulged in excessive drinking. Lastly, it was alleged that the deceased complained of the meanness of the beneficiary's parents who, he said, had had all his money. In addition to the allegations objected to, the defendants repeated the substance of the case under para. 2, and claimed that in the circumstances the plaintiffs must be put to

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strict proof that the deceased knew and approved of the contents of the will.

No allegation was made either of fraud or undue influence on the part of the beneficiary or his parents. Nor was it alleged that either the beneficiary or his parents prompted or took part in the preparation or execution of the will, or that they even so much as knew of its existence. The inference to be drawn from an examination of the document itself was, Willmer J. found, that it was prepared by solicitors; and it in fact purported to have been attested by two clerks in the employment of the plaintiffs' solicitors.

The registrar dismissed the plaintiffs' application that the words objected to should be struck out under R.S.C. Ord. 19, r. 27 (1), and the plaintiffs appealed.

J. E. S. Simon and Trevor Reeve for the plaintiffs. Though the subject-matter which it is sought to strike out is of a nature calculated to "embarrass" the plaintiffs, who may desire to avoid discussion of such matters in open court, it is necessary for me to show that the subject-matter of the allegations is irrelevant to a plea of want of knowledge and approval. Such a plea covers three classes of case: (1.) where the deceased delegates the drawing up of the will to another without restriction and signs the document prepared without knowing its contents; (2.) where, in certain circumstances, words are introduced by mistake; (3.) where, as in *Barry v. Butlin* (2), there are circumstances which raise a suspicion that the testator's mind and judgment are not represented by the contents of the will. The third class of case is relevant here.

It is relevant to allege facts which raise a suspicion in the mind of the court; but the suspicion must be that the deceased did not know and approve of the contents of the will. To allege a sexual association between the testator and a beneficiary, whether homosexual or heterosexual, provides a motive for benefiting the beneficiary, and therefore raises no such suspicion. The defendants are seeking covertly to insinuate a plea of undue influence under a plea of want of knowledge and approval. This is contrary to the rule laid down in *Low v. Guthrie* (3).

Such pleading also offends against r. 40A of the Contentious Probate Rules, 1862, whereby no defence shall be available under a plea of want of knowledge and approval which might have been raised under the other pleas referred to in the rule.

(1) R.S.C. Ord. 19, r. 27: "The court or a judge may at any stage of the proceedings order to be struck out or amended any matter in any indorsement or pleading which may be unnecessary or

"scandalous or which may tend to prejudice, embarrass or delay the fair trial of the action . . .".

(2) (1838) 2 Moo. P. C. 480.

(3) [1909] A. C. 278, 281.

John Mortimer (*Clifford Mortimer* with him) for the defendants. It is for those who propound a will to remove such suspicion as may attach to it: see *Tyrrell v. Painton* (4). See also *Finny v. Govett* (5). The court must decide whether there are circumstances which give rise to a reasonable ground of suspicion.

It is not pleaded that the will should be set aside because of the deceased's homosexual relations; it is not alleged that there were in fact such relations: what is important is the state of the testator's mind, and his boasting, when he made the will, of habits which may in fact have been delusions. It is submitted that circumstances such as these must excite suspicion, for they are such as to prevent a testator from having full knowledge and approval of the contents of his will. It is the duty of the court to inquire into such suspicions. It was stated in *Barry v. Butlin* (6) that the court must pronounce against a will unless circumstances of doubt and suspicion are removed: see *Tyrrell v. Painton* (4), *Finny v. Govett* (5), *Constable v. Tuffnell* (7), *Durling v. Loveland* (8).

Rule 40A of the rules of 1862 has been superseded by R.S.C. Ord. 19, r. 25A.

Simon in reply.

Cur. adv. vult.

May 12. WILLMER J. read the following judgment:—When this matter was before me in chambers it appeared to me that the questions raised were of such widespread and general importance that, at the request of counsel for the plaintiffs, I adjourned it into court for argument. [His Lordship stated the facts, as set out above, and continued:] That the allegations objected to impute to the deceased conduct of a scandalous character there can be no doubt. But that circumstance does not necessarily make the pleading "scandalous" so as to be objectionable within the meaning of the rule. It is, furthermore, contended on behalf of the plaintiffs that the pleading in its present form does tend to prejudice and embarrass the fair trial of the action, because it may well be that rather than face the scandal and publicity of having these allegations made in open court, the beneficiary under the will may prefer that the plaintiffs should not proceed with the action. I can well believe that this may be so. It is conceded, however, by counsel on behalf of the plaintiffs that a pleading cannot be ordered to be struck out under this rule, however unpleasant the allegations may be, unless it is shown that they are completely irrelevant and wholly unnecessary for the due prosecution of the

(4) [1894] P. 151.

(5) (1908) 25 T. L. R. 186, 188.

(6) 2 Moo. P. C. 480.

(7) (1833) 4 Hagg. Ecc. 465, 495.

(8) (1839) 2 Curt. 225, 229.

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action. As was said by Lord Selborne L.C. in *Christie v. Christie* (9): "The sole question in such a case is whether the matter alleged to be scandalous . . . would be admissible in evidence to show the truth of any allegation in the bill which is material with reference to the relief that is prayed". In these circumstances it appears to me that the question which I have to decide is whether these allegations could conceivably be admissible in evidence on the issue whether the deceased knew and approved of the contents of the will.

On behalf of the plaintiffs it is contended that these allegations, however relevant they might be on the question of the testamentary capacity of the deceased (in relation to which they are not pleaded), or on an issue of undue influence (which is not raised), could not in any circumstances be relevant, and therefore could not be admissible in evidence, in relation to the question whether the deceased knew and approved of the contents of the will. Reliance is also placed by the plaintiffs on the provisions of r. 40A of the Contentious Probate Rules, 1862. The effect of this rule is, subject to the leave of the court, to limit a defendant in an action such as this to five pleas, as follows: (1.) that the will was not duly executed in accordance with the provisions of the statute; (2.) that the deceased was not of sound mind, memory and understanding; (3.) that the execution of the will was obtained by undue influence; (4.) that the execution of the will was obtained by fraud; (5.) lastly, that the deceased did not know and approve of the contents of the will. The rule then proceeds as follows: "Any party pleading the last of the above pleas shall therewith (unless otherwise ordered by the judge) deliver to the adverse party and file in the registry particulars in writing, stating shortly the substance of the case he intends to set up thereunder; and no defence shall be available thereunder which might have been raised under any other of the said pleas, unless such other plea be pleaded therewith".

On behalf of the defendants it is contended that the facts set out in the allegations objected to are such as (if established) would be likely to raise in the mind of the court a suspicion that the alleged will was not that of a free and competent testator who was in a position to exercise, and did exercise, thought, judgment and reflection in relation thereto. Such facts, if known to a solicitor drawing the will would, it is alleged, be bound to put him on inquiry, and are such as it would be the duty of counsel to bring to the attention of the court. If so, it is contended that it is not only proper, but necessary, that they should be pleaded. It is pointed out, and, in my judgment, rightly so, that it is not for me, at this stage, to say whether the facts alleged do raise a

suspicion: that will be for the judge at the trial to decide. I can only order the allegations to be struck out in limine, if satisfied that they are incapable of raising a suspicion such as would influence the decision of the court. It is further contended on behalf of the defendants that r. 40A of the Contentious Probate Rules, 1862, is no longer in force, but must be regarded as superseded by R.S.C. Ord. 19, r. 25 (a) (10), by which alone, it is said, pleading of defences in probate actions is now governed.

In order to arrive at a conclusion as to the validity of these contentions I think it necessary to examine with some care the nature of the plea of want of knowledge and approval. There are two situations in which such a plea may be raised. The first is where it can be alleged that the execution of the will has been attended by some bona fide mistake—for example, a mistake in drafting or copying—which the testator omitted to notice when executing the will. It is not suggested that any question of that sort arises in the present case. The other situation in which the plea of want of knowledge and approval is commonly raised is where the circumstances attending the execution of the will are such as to excite suspicion, under the rule laid down by the Privy Council in the well-known case of *Barry v. Butlin* (11). It is within this class that it is sought to bring the present case.

The circumstances in *Barry v. Butlin* (11) were that the deceased's solicitor, who prepared the will, was himself a substantial beneficiary under it, and the question which had to be decided was whether the suspicion engendered by this circumstance, as well as by the provisions of the will itself, had been satisfactorily dispelled by the party propounding the will. In delivering the judgment of the Privy Council, Parke B. enunciated two rules, which have since been universally accepted and applied as governing cases of this character. The first rule is (12) "that the onus probandi lies in every case upon the party propounding a will; and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator". So far as this rule is concerned, Parke B. explained that the onus "is in general discharged by proof of capacity and the fact of execution, from which the knowledge of and assent to the contents of the instrument are assumed". The second

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(10) R.S.C. Ord. 19, r. 25 (a):
"In probate actions it shall be
"stated with regard to every defence
"which is pleaded what is the sub-
"stance of the case on which it is
"intended to rely: and further
"where it is pleaded that the
"testator was not of sound mind,
"memory, and understanding, par-

"ticulars of any specific instances of
"delusion shall be delivered before
"the case is set down for trial, and,
"except by leave of the court or a
"judge, no evidence shall be given
"of any other instances at the
"trial".

(11) 2 Moo. P. C. 480.

(12) Ibid. 482.

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rule is (13) "that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased".

It will be observed from the words which I have just quoted that this second rule was limited by Parke B. to cases in which the will was prepared by a person taking a benefit under it. It is true that in reviewing the particular facts of the case he refers to the circumstance that the deceased was a person of weak mind. But he does not treat this as being of itself a circumstance to arouse suspicion, for he says (15) that "the only consequence will be, that it adds to the suspicion which unquestionably belongs to the circumstance of the attorney who prepared the will, taking no less than a fourth of the estate, and the legatees taking the whole to the exclusion of his [the deceased's] own family, and calls upon us to watch the proof of the will itself with increased jealousy and suspicion".

The rule in *Barry v. Butlin* (16) was approved and applied by the House of Lords in *Fulton v. Andrew* (17), again a case in which the will was prepared by persons who took a substantial benefit under it. Lord Hatherley took the opportunity of restating the rule in the following terms (18): "There is one rule which has always been laid down by the courts having to deal with wills, and that is, that a person who is instrumental in the framing of a will, as these two persons undoubtedly were, and who obtains a bounty by that will, is placed in a different position from ordinary legatees who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator and that he was of sound mind and memory, and capable of comprehending it. But there is a further onus upon those who take for their own benefit, after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction".

With one exception, to which I will presently refer, in all the subsequent cases in the reports in which the rule in *Barry v. Butlin* (16) has been applied, the circumstance giving ground for suspicion has been the fact that the will was prepared, or its execution procured, by a person taking a benefit under it. The exception is *Tyrrell v. Painton* (19), where the will was prepared

(13) 2 Moo. P. C. 482.

(15) Ibid. 487.

(16) 2 Moo. P. C. 480.

(17) (1875) L. R. 7 H. L. 448.

(18) Ibid. 471.

(19) [1894] P. 151.

by the son of the defendant, the defendant being the person in whose favour the will was made. In that case the Court of Appeal held that the rule in *Barry v. Butlin* (16) is not, to quote the words of Lindley L.J. (20), "confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court". Lindley L.J. however, went on to make it clear that the circumstances to which he was referring must be circumstances attending the preparation or execution of the will, for a few lines lower down he said: "Here the circumstances under which the will of the 9th was prepared and signed are such as to cause the gravest suspicions". In a previous passage (21), he had said substantially the same thing. A. L. Smith L.J. speaks (22) of "the grave suspicions surrounding the will", and a little later uses the significant phrase, "especially a will brought into existence as this will was". Davey L.J. neatly and concisely sums up the rule which the Court of Appeal were laying down in the following words (23): "The principle is, that whenever a will is prepared under circumstances which raise a well-grounded suspicion that it does not express the mind of the testator, the court ought not to pronounce in favour of it unless the suspicion is removed".

The conclusion which I draw from these authorities to which I have referred is that, when it is a question of knowledge and approval of the contents of a will the circumstances which are held to excite the suspicions of the court must be circumstances attending, or at least relevant to, the preparation and execution of the will itself. This view is, I think, confirmed by the decision of the Court of Appeal in *Davis v. Mayhew* (24), where it was held that a suspicion engendered by extraneous circumstances, arising subsequent to the execution of the will, was not a sufficient reason for rebutting the presumption of due execution of a will regular upon its face. In the course of an exhaustive judgment Lord Hanworth M.R. said (25): "What of the suspicion? It is not such as attaches to the document itself in the sense in which Sir James Wilde uses the term in *Guardhouse v. Blackburn* (26) or as it arose in *Tyrrell v. Painton* (27) in the preparation of the will. The wide definition of suspicion stated by Lindley L.J. in the latter case (28), that it 'extends to all cases in which circumstances exist which excite the suspicion of the court', appears to have been used

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(20) [1894] P. 157.

(21) *Ibid.* 156.(22) *Ibid.* 158.(23) *Ibid.* 159.

(24) [1927] P. 264.

(25) *Ibid.* 280.(26) (1866) L. R. 1 P. & M. 109,
116.

(27) [1894] P. 151.

(28) *Ibid.* 157.

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“ in reference to the preparation of the will, its intrinsic terms, and
 “ the circumstances surrounding its preparation and execution,
 “ and Davey L.J. seems to have had the same matters in mind.
 “ Their judgments were not intended to alter, but to affirm the
 “ principles laid down in the cases I have cited ”.

There is some authority in Mortimer's Probate Law and Practice (2nd ed.) p. 76, for the proposition that in some circumstances matters extraneous to the preparation and execution of the will may properly be held to excite the suspicion of the court as to whether the deceased knew and approved of its contents. It is there stated: “ Again the following circumstances may require satisfactory explanation, especially where the person who prepared the will was a beneficiary thereunder: the fact that the testator gave no instructions for the will, and was without independent advice, legal or otherwise; that persons who benefited assumed authority over him while he was weak or debilitated; excluded his relations and friends; obtained money from him; and assumed control of his affairs. Any one of these circumstances, standing alone, may admit of explanation, but their cumulative effect would be to raise a strong suspicion that the testator was a mere passive instrument in their hands ”.

It is with hesitation that I venture to criticize an authority which so well deserves respect, but if the author means by this passage that circumstances such as he refers to, if not in some way concerned with, or shown to be relevant to, the preparation and execution of the will, are such as ought to excite the suspicion of the court, I doubt whether the views expressed are consistent with the rule as defined in *Barry v. Butlin* (29), and the subsequent cases to which I have referred. It is to be noted that all the authorities cited in support of the proposition in the text are anterior in date to *Barry v. Butlin* (29).

Turning now to the allegations in this case to which exception is taken, there is nothing to show that the beneficiary, or any of his family, had any part whatsoever in the preparation of this will. On the contrary, as I have already stated, it would appear that the will was in fact prepared by solicitors. The allegations are not connected in any way with the preparation and execution of the will. In these circumstances, is Mr. Mortimer well founded in contending that the matters alleged are such that they will have to be brought to the attention of the court? The answer must be, only if they are relevant in some way to the preparation and execution of the will—that is, only if they go to show that the will was prepared in circumstances capable of raising a well-grounded suspicion that it does not express the mind of the testator, to quote the phrase used by Davey L.J. in *Tyrrell v. Painton* (30).

In so far as the allegations go to show an attachment to, or an affection for, the beneficiary, the inference is rather the other way, for in such circumstances the testator might well have desired to benefit him in preference to other persons. If it be said that the relations alleged between the deceased and the beneficiary at least go to show eccentric behaviour on his part, this might well, I should have thought, be used in support of the allegation that he was lacking in testamentary capacity. The same may be said of the allegation that the deceased habitually drank to excess in the inn kept by the beneficiary's parents. But unless these eccentricities of the deceased go to show a lack of testamentary capacity, I do not see in what other way they can possibly be relevant to the question whether he knew and approved of the contents of the will. The allegation that the deceased complained of the parents of the beneficiary having had all his money might, I should have thought, have been relevant to a suggestion that the will was procured as the result of undue influence on their part. But undue influence has not been alleged. It is one of the complaints made by Mr. Simon that the pleading in its present form proceeds by way of innuendo: it tends to suggest undue influence without actually alleging it. The pleader, he says, is willing to wound, but afraid to strike. That, it is contended, offends against the principle laid down by Lord Loreburn L.C. in *Low v. Guthrie*, when he said (31) that the rule—that is, the rule laid down in *Barry v. Butlin* (32) and applied in *Fulton v. Andrew* (33)—is not to be “used as a screen behind which one man is to be at liberty “to charge another with fraud or dishonesty without assuming “the responsibility of making that charge in plain terms”. If it is intended to allege undue influence on the part of the beneficiary or his parents, such an allegation should, in my judgment, be pleaded in plain and unambiguous terms. In the absence of such a plea and in the absence of anything to show that the beneficiary or his parents were in any way concerned with the preparation and execution of this will, I do not see how the allegations put forward can possibly be relevant to the question whether the deceased knew and approved of the contents of the will.

It is obvious that in the nature of things a fair measure of latitude must be allowed the pleader in alleging facts in support of a plea of want of knowledge and approval. But, after careful and anxious consideration, I have come to the conclusion that this pleading goes too far, and that, having regard to the manner in which the application of the rule in *Barry v. Butlin* (32) has been limited in the authorities to which I have referred, the facts alleged in this case in the passage objected to cannot, in

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(31) [1909] A. C. 278, 281-2.

(33) L. R. 7 H. L. 448, 471.

(32) 2 Moo. P. C. 480.

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the circumstances of the particular case, possibly be relevant to the issue of want of knowledge and approval. Being of a scandalous nature, and such as may tend to prejudice the fair trial of the action, I think that they ought to be struck out. Having regard, however, to what I have said as to the possibility of these allegations being relevant to the testamentary capacity of the deceased, or to a possible plea of undue influence, my order will be without prejudice to any application for amendment that may hereafter be made.

I have reached this conclusion, as will be seen, quite independently of r. 40A of the Contentious Probate Rules, 1862. I think that I should add, however, that in my judgment the allegations sought to be struck out are also objectionable as being in direct contravention of the last sentence of that rule. I do not assent to the proposition that r. 40A has been now entirely superseded by R.S.C. Ord. 19, r. 25 (a). Clearly the editors of the Annual Practice do not take that view, for in the notes to Ord. 19, r. 25 (a), they specifically refer to r. 40A of the Contentious Probate Rules. As recently as 1922, in *McLeod v. Shrewsbury (Earl)* (34), r. 40A was treated by Sir Henry Duke P. as being still in force (35), where, however, the learned President refers erroneously to the rule as r. 40. By s. 103, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, reproducing s. 21 of the Judicature Act, 1875, it is provided as follows:—"Save as is otherwise provided "by this Act or by rules of court, all forms and methods of "procedure which, under or by virtue of any law, custom, general "order or rules whatsoever, were formerly in force in any of the "courts the jurisdiction of which is vested in the High Court or "the Court of Appeal respectively, and which are not inconsistent "with this Act or with rules of court, may continue to be used "in the High Court and the Court of Appeal respectively in the "like cases and for the like purposes as those in and for which "they would have been applicable in the former respective "courts".

It is obvious that by R.S.C. Ord. 19, r. 25 (a), which was first made in 1901, a subsequent amendment was made with regard to the pleading of defences in probate actions. But Ord. 19, r. 25 (a), does not by any means cover the whole ground covered by r. 40A of the Contentious Probate Rules, and in particular it does not deal at all with the matter covered by the last sentence of that rule, which is what the plaintiffs rely on in this case. Certainly it does not expressly revoke r. 40A, and, seeing that it does not purport to cover the whole of the ground covered by r. 40A, I do not think that it can be taken to have revoked that rule by implication. I prefer to follow the view expressed by Sir Henry

(34) [1922] P. 112.

(35) Ibid. 117.

Duke P., and to treat r. 40A as being still in force, except in so far as its provisions have been amended by R.S.C. Ord. 19, r. 25 (a). If that is the right view, it appears to me to be an additional reason for holding that the allegations objected to in this case should be struck out. As I have already indicated, it appears to me that these allegations could have been raised under the plea of testamentary incapacity, or possibly under a plea of undue influence. If so, it is not open to the defendants, under the rules, to raise them on a plea of want of knowledge and approval.

For these reasons my conclusion is that this appeal succeeds, and there will be an order striking out the passage particularized in the summons, without prejudice to any further application for amendment which may hereafter be made.

Order accordingly.

Solicitors: *Ellis, Bickersteth, Aglionby & Hazel, for Hay & Son, Wokingham; Hasties.*

J. B. G.

MOLE v. MOLE.

C. A.

Husband and wife—Divorce—Desertion—Probation officer—Attempt towards reconciliation—Husband's reply to officer's letter—Whether privileged.

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June 13, 14.

Bucknill,
Somervell and
Denning L.JJ.

Where litigation is imminent between husband and wife, as soon as a probation officer is asked by either husband or wife to act as an intermediary between them with a view to reconciliation, a statement, written or oral, made by either party to him is privileged. The rule in *McTaggart v. McTaggart* [1949] P. 94 is not confined to cases where husband and wife have both accepted the probation officer as a conciliator.

Per Denning, L.J. The principle laid down in *McTaggart v. McTaggart* applies not only to probation officers, but to such persons as clergy, doctors or marriage-guidance councillors to whom husband or wife goes with a view to reconciliation, there being a tacit understanding that the conversations are without prejudice, and there is no reason why the solicitors of the parties should be in any different position.

McTaggart v. McTaggart [1949] P. 94 explained.

Bostock v. Bostock [1950] P. 154 disapproved by Denning, L.J.

Applied. POOL v. POOL
[1951] P. 47

APPEAL from Mr. Commissioner Bush James, K.C.

The parties were married on July 28, 1945, when the husband was in the Army, and they did not live together in any permanent

C. A. home until December, 1945, when they lived as lodgers in a friend's house. On March 30, 1946, the wife left the husband.

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The wife presented a petition for dissolution of the marriage, alleging cruelty and desertion. She said that she had left her husband by reason of the cruelty which she alleged, whereby her husband had deserted her. One of the particulars of cruelty was that the husband treated her with contempt, calling her "madam", indulging in fits of sulks and ignoring her presence. The commissioner, stopping the husband before he had called all his witnesses, dismissed the petition on both grounds, finding that the wife had left the home without any reasonable cause. The wife appealed. The case is reported only on the question whether privilege attached to a letter written by the husband in reply to one from the probation officer whom the wife had consulted.

Seuffert for the wife
The husband in person.

BUCKNILL, L.J. It is clear that there was a serious issue as to whether the wife had asked the husband to take her back; if so, whether she imposed any conditions; and what the conditions were. The commissioner said very tersely: "The husband 'came back and found her there' at her lodgings, 'and they 'had another conversation upstairs, in which, according to the 'husband, the wife made it quite clear that she would come back, 'but again only on conditions. What right this woman had to 'insist upon conditions, when, as far as I can see, the husband 'had treated her in a reasonable way, I cannot conceive. At 'any rate, she did not come back and she has never come back' ". As my brother Denning pointed out, it might be that the condition which the wife wished to impose was that they should have normal intercourse. That, I think, would be quite a reasonable condition. I do not know what the condition was, and no one in the case saw fit to ask.

It appears that eventually, in 1948, the wife visited a solicitor and, on his advice, went to the police court. On the advice received there, the wife either wrote to or saw the probation officer, who wrote to the husband. The copy of that letter has unfortunately been lost. The original letter was received by the husband, and answered by him. He then put it into an envelope, wrote on it "I have not changed my mind", and left that at the house where the wife had resided. But he also answered the letter from the probation officer.

There was some confusion at the trial about this letter, because the husband took the objection, when the probation officer was called, that his letter answering the officer was privileged in accordance with the opinions given by two Lords Justices in

McTaggart v. McTaggart (1). The commissioner ruled that it was not privileged. He seems, however, to have dismissed the letter as a valuable piece of evidence by saying that the husband wrote it in pique and did not really mean what he said. In my opinion the letter was privileged and should not have been admitted. Mr. Seuffert argued that the opinions expressed by the Lords Justices in *McTaggart v. McTaggart* (1) only applied when both sides had accepted the probation officer as a conciliator between them; but I do not think that that is what was intended in those opinions.

Denning, L.J., said in that case (2): "The rule as to 'without prejudice' communications applies with especial force to negotiations for reconciliation. It applies whenever the dispute has got to such dimensions that litigation is imminent. In all cases where the estrangement has reached the stage where the parties consult a probation officer that is the case. Then, it is clear that there is a dispute which may end either in the magistrates' court or the divorce court. The probation officer has no privilege of his own in respect of disclosure".

This dispute had reached the stage where litigation was imminent: the wife had seen a solicitor; the parties had been living apart for two years; and there was no reasonable prospect of their living together. It seems to me that if the husband, instead of writing this letter, had gone to see the probation officer and had then said to him orally what he in fact wrote in it, it would be impossible to argue that, under the rule formulated in *McTaggart v. McTaggart* (1), that statement would not be privileged.

First of all, I think that the principles stated by Cohen and Denning, L.J., in *McTaggart's* case (1) should be applied here. I think it essential, if a reconciliation is to be attempted with the probation officer as intermediary, that statements made by either party to him, as soon as he is asked to act in that capacity, should be treated as privileged. Mr. Seuffert suggested that if one applied that principle at such an early stage, as in this case, it would tend to prejudice the working of another principle, viz., that a spouse is no longer in desertion if he or she has made a bona fide attempt to be taken back; and he argued that, if such a bona fide attempt is made through a probation officer, it ought to be taken into account. There is some force in that argument, but one must bear in mind that in matrimonial disputes the State is also an interested party: it is more interested in reconciliation than in divorce, and, if the rule as to privilege tends to promote the prospects of reconciliation, I think it ought to be applied, although it may make it difficult for the spouse in some ways to prove a bona fide attempt to return home. That difficulty can

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(1) [1949] P. 94.

(2) Ibid. 97.

C. A. always be got over if the deserting spouse writes a suitable and
 1950 bona fide letter and sends it by registered post to the deserted
 spouse.

MOLE

v.
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SOMERVELL, L.J. I agree.

Bucknill L.J.

DENNING, L.J. I agree so fully with all that Bucknill, L.J., has said that I do not wish to add anything except to say that I do not for my own part accept the correctness of the decision in *Bostock v. Bostock* (3). I take it that the principle laid down in *McTaggart v. McTaggart* (4) applies not only to probation officers but also to other persons such as clergy, doctors, or marriage-guidance councillors, to whom the parties or one of them go with a view to reconciliation, there being a tacit understanding that the conversations are without prejudice. I see no reason why the solicitors of the parties should be in any different position.

Appeal allowed.

New trial ordered.

Solicitors: *Smiles & Co.*

C. G. M.

(3) [1950] P. 154

(4) [1949] P. 94.

1950
 June 28.

IN THE GOODS OF EDWARDS-TAYLOR (DECD.).

Willmer J.

Probate—Administration—Application for grant ad colligenda bona—Allegation beneficiary not fitted for duties of administrator—Jurisdiction—Supreme Court of Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 162—Administration of Justice Act, 1928 (18 & 19 Geo. 5, c. 26), s. 9.

By her last will and testament the deceased left her large estate to her only daughter. There were no surviving executors of the will, and the daughter, who had only recently come of age, gave instructions to solicitors to apply for a grant of letters of administration with the will annexed to herself as residuary legatee. It was, however, alleged by certain members of the family that the daughter was under-developed both mentally and physically, and was not then fitted to be entrusted with the duties of administration. The court was accordingly moved by two sisters of the deceased, and by a trustee under the will of the deceased's father, to make an order in its discretionary powers under s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the

Administration of Justice Act, 1928, for a grant to a certain bank of administration ad colligenda bona, giving them power, among other things, to make a special allowance to the daughter out of the estate. The court was asked so to act in order to protect the daughter's interests until such time as she should be more experienced.

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Held, that, notwithstanding the assumption that the application was made with the best intention, and that it was in the interests of the daughter herself that the management of the estate should in some way be controlled, the court must, in its discretion, decline to make an order: none of the matters alleged went to the question of administration, but rather to the wisdom of allowing the daughter to enjoy her estate; and it would be a bad precedent to use the section for the ulterior purpose of interfering, by order of the court, with a beneficiary's enjoyment of an estate to which he or she was by law entitled.

PROBATE MOTION.

The deceased died in August, 1949. By her last will dated October, 1928, she left her estate worth about 19,000*l.* gross to her only daughter, the respondent, who also inherited on her mother's death, and on attaining the age of twenty-one, some 21,000*l.* under the will of her maternal grandfather. There were no surviving executors of the deceased's will. The daughter came of age in October, 1949.

The applicants were two sisters of the deceased and a trustee under the will of the grandfather above referred to. It was stated in the case on motion that the daughter had instructed her solicitors to apply for a grant of letters of administration with the will annexed to herself as residuary legatee under the deceased's will. It was further stated that "all the members of her family" "interested in [the daughter's] welfare are of opinion that it "would be disastrous to her interests to be placed in free control "of this large fortune at present, and that she is not fitted at "present to be entrusted with the duty of administrator", and that the applicants, who were financially disinterested in the daughter's affairs, were moving the court "with a view to her "interests being protected until such time as it is hoped her mind "will fully mature, and by contact with the outside world she "will have gained sufficient experience of affairs to justify the "court in giving her a full grant of administration".

It was alleged that, owing to a background of ill-health during her childhood, she was under-developed both physically and mentally, and in consequence was at present unfitted not only for the enjoyment of a large sum of money but also for the task of administration. The Midland Bank Executor and Trustee Company agreed to act as administrators ad colligenda bona should the court appoint it, and the court was moved for such a

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grant, with the will annexed, with special powers (which included the making of a special allowance to the respondent) under s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928 (1).

The daughter, in her affidavit, denied that she was unfitted for the enjoyment of the estate or for the task of administration, and she strongly opposed any order restricting her control of her property. Numerous affidavits relative to the merits of the case were before the court.

Russell, K.C., and *Latey, K.C.*, for the applicants.

Manningham-Buller, K.C., and *R. T. Barnard* for the daughter.

WILLMER, J. [after referring to the facts]:—This motion is brought before the court because it is said that owing to a background of ill-health during her childhood the daughter is under-developed both physically and mentally and is consequently quite unfitted, not only for the enjoyment of a large sum of money such as she would inherit under this will, but also, as I understand it, for the task of administration. What is contemplated is that for a year or two, during which time it is hoped that she will mature, the Midland Bank Executor and Trustee Company should be appointed administrators ad colligenda bona, with special powers, among other things, to pay a temporary allowance to the daughter for her maintenance.

It is perhaps not without significance that the daughter's own solicitor and the psychiatrist who have made an affidavit on her behalf both take the view that it would indeed probably be wise for a young woman in the position of the daughter to consent to some sort of machinery whereby this large estate would be subjected to some sort of control until she has matured and developed a little further.

The daughter herself, however, denies that she is in any way unfitted for the enjoyment of this estate or for the task of administration, and I think that there is no doubt that she has every wish to bring this large sum of money under her own

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by Administration of Justice Act, 1928, s. 9: "... if, by reason of the insolvency of the estate of the deceased, or of any other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who,

"but for this provision, would by law have been entitled to the grant of administration, the court may in its discretion notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the court thinks fit."

control and exercise her own power over its disposition at the earliest possible date. I say nothing at the present stage as to the wisdom of that point of view, nor do I feel that it is for me to comment on the merits of the application. I think that my decision today must be based on the hypothesis that the merits are in accordance with what has been said on behalf of the applicants; that is to say, I am prepared to assume that it would be wise, and in the best interests of this young woman, that her fortune should be tied up under somebody else's control for the time being.

On that assumption the questions to my mind are, first, whether the court has power to make an order of the nature asked for by the applicants, and, secondly, if it has the power, whether there is any precedent for the exercise of such a power in the manner suggested.

The application is made under s. 162 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by s. 9 of the Administration of Justice Act, 1928, which added a new proviso to the original section.

[His Lordship read s. 162 of the Judicature Act, 1926, as amended, and continued.]

It is contended that that proviso gives the court a discretion to make an order of the nature sought by the applicants in this case. It has been frankly conceded by counsel for the applicants that he has found it impossible to put his finger on any case in which a similar order has been made in circumstances such as these. He referred to two cases where special orders were made for the administration of particular estates: one, *In the Estate of San Pietro, deceased* (2), in which the interests of enemy aliens were concerned, and the other, *In the Goods of Farrands* (3), in which the person who, but for the proviso, would have been entitled to a grant of administration was quite unfitted to handle the task of administration. But no case has been cited to me where the sole ground for interfering was the fact that the court in its wisdom thought it undesirable that the particular person normally entitled to a grant should have the full enjoyment of the estate in question. In other words, no case has been cited in which the court has made an order designed merely to protect the beneficiary from himself or herself.

I am myself much attracted to the view put forward in argument by counsel for the daughter that this proviso, where it mentions "insolvency of the estate or any other special circumstances", relates only to special circumstances in connexion with the estate itself or the administration of the estate. The daughter complains that the applicants are seeking to use the

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(2) [1941] P. 16.

(3) (1876) 1 P. D. 439.

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machinery of this section, which is designed solely to deal with the question of administration, for the ulterior purpose of controlling the disposition of her estate and inhibiting her from enjoying it or from dealing with her own property in the way in which she wishes to deal with it. As her counsel has suggested, the position is really the same as though the daughter had been left a legacy of an equivalent sum of money under the will of some outside person. It was argued, with considerable force, that, in such circumstances, provided the beneficiary were *sui juris*, this court could have no possible right to interfere so as to inhibit the full enjoyment of any such legacy.

It is my opinion that very similar considerations apply when I am asked to use the machinery of this section to achieve the ulterior object of preventing the respondent from exercising to the full her enjoyment of the estate left to her by her mother. I say nothing, as I have already indicated, about the wisdom or otherwise of controlling the activities of this young woman. Whatever its merits, if the court were to accede to this application it would be setting a new precedent, and using s. 162 of the Act of 1925 for an entirely new purpose; and it might very well be found hereafter, as I suggested in argument, that the court was striking the first blow to drive in the thin end of a very large wedge. It is difficult to see where such a precedent might lead if it were once admitted that this section could be used for the ulterior purpose of interfering, by order of the court, with a beneficiary's enjoyment of an estate to which he or she is by law entitled.

In those circumstances, notwithstanding the assumption which I make that this application is made with the best intentions, and that it is in the interests of the respondent herself that the management of the estate should in some way be controlled for her own benefit, I must in my discretion decline to make the order asked for in this case. None of the matters alleged go to the question of administration; they go rather to the wisdom of allowing this young woman to enjoy the estate. It would be a bad precedent to use this section for the ulterior purpose for which it is sought to be used, and in those circumstances I conceive it to be my duty to dismiss this motion.

Application dismissed.

Solicitors: Gibson & Weldon, for Clough & Son, Cleckheaton;
Janson, Cobb, Pearson & Co.

J. B. G.

ROSE v. ROSE.

C. A.

Divorce—Maintenance—Assessment—Wife's earning capacity—Domestic work.

1950
June 15, 16.

Bucknill,
Somervell and
Denning L.JJ.

A wife aged forty-one years, who was granted a decree of divorce after twenty years of married life, had done no work outside the home during that period, and had no trade or calling, though she was capable of domestic work. There were two children of the marriage, one of whom was a boy of four and a-half years, of whom she had the care. For a short time after the wife had parted from her husband she had worked in the kitchen for a friend who owned a school. The husband was a chartered civil engineer and chief assistant bridge engineer to a county council. His gross salary was 735*l.* a year.

The judge, on appeal from a registrar, in assessing her maintenance, had attributed to her a notional earning capacity of 104*l.* a year for domestic work.

Held, without laying down any general rule in considering whether and in what circumstances earning capacity ought to be brought into such a calculation in the case of a wife who had not been required to earn any income during the matrimonial life, that, on the facts, the judge, in assessing maintenance, should not have taken this earning capacity into consideration.

Per Somervell, L.J. *Prima facie* where, during the matrimonial life, the means of the husband were such that the wife had not been required to go out and earn money, then, in considering the proper sum for maintenance, it would seem to be wrong that the sum which the husband could be ordered to pay her should be based on what she could earn in going out to work.

Per Denning, L.J. If a wife did earn, then her earnings must be taken into account; or if she were a young woman with no children and obviously ought to go out to work in her own interest, but did not do so, then her potential earning capacity ought to be taken into account; or if she had worked regularly during the married life and might reasonably be expected to work after the divorce, again her potential earnings ought to be taken into account. Except in cases such as these, it did not as a rule lie in the mouth of a wrongdoing husband to say that she ought to go out to work simply in order to relieve him from paying maintenance.

APPEAL from Willmer, J.

After twenty years of married life, the appellant wife was granted a decree of divorce on the ground of her husband's adultery. The husband was a chartered civil engineer and chief assistant bridge engineer to a county council. His gross salary at the material time was 735*l.* a year. The wife, now forty-one years of age, had done no work outside the home during her married life, and had no trade or calling, though she was capable of domestic work. There were two children of the marriage, one

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of whom was a boy of four and a-half years, of whom she had the care. For a short time after the wife had parted from her husband, she had worked in the kitchen for a friend, who owned a school.

The wife applied for maintenance, and the registrar made an order for 4*l.* a week, free of tax, and for 1*l.* a week in respect of the child. The order free of tax meant such a sum as, after deduction of tax at the standard rate, would leave 4*l.* a week, which amounted approximately to 375*l.* a year. On the appeal by the husband to the judge, it was conceded for the wife that that amount could not stand. Willmer, J., reduced the amount to 156*l.* a year—i.e., 3*l.* a week—less tax.

The wife appealed, claiming 4*l.* instead of 3*l.* a week, but subject to tax (not, as ordered by the registrar, free of tax) on the ground that the judge had attributed to her a notional earning capacity: for he had taken into account her earning capacity in the same way as if it were resulting in actual earnings added to the husband's income in arriving at the joint income; and he had based his figure of maintenance on an appropriate proportion of the joint income, so assessed. No complaint was made of the order for 1*l.* a week in respect of the child.

F. Donald McIntyre for the wife.

William Latey, K.C., for the husband.

BUCKNILL, L.J. I will ask Somervell, L.J., to deliver the first judgment.

SOMERVELL, L.J. I do not propose to lay down any general rule or to consider whether or in what circumstances a wife's earning capacity ought to be brought into the calculation of maintenance in the case of a wife who has not been required to earn any money during the matrimonial life. But, in my view, where during the matrimonial life the means of (in this case) the husband (it is not suggested that the wife had any means) are such that the wife has not been required to go out and earn money, then I should say that, in considering the proper sum for maintenance, it would *prima facie* seem to be wrong that the husband should be able to say: "Now you must go out and work, "and the only sum I can be ordered to pay is a sum based on you "yourself going out to work, which you were not required to do "when you were my wife, and which you would not have had "to do, if I had not committed adultery and broken up the "home", as in this case. That *prima facie* approach seems to me to be plainly right in a case such as this, where the marriage had lasted for some twenty years; the wife is a woman of forty-one years of age, who has no normal trade or calling, though no doubt she is capable of doing domestic work, and where there is a

child of some four and a-half years of age for her to look after. Therefore, I think the order should have been for 4*l.* a week less tax, and that the appeal succeeds.

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Somervell L.J.

BUCKNILL, L.J. I agree with the judgment which has just been delivered. It seems to me that the judge would not have disturbed the figure fixed by the learned registrar, if it were merely a question of amount. I feel that he must have amended it, because he felt that the registrar had not taken into consideration the earning capacity of the wife; and Mr. Latey has said that during the discussion before the learned judge he had submitted that the earning capacity of the wife could be put at 2*l.* a week. Unfortunately, we have not any record of the judgment, but I am satisfied that that was why he altered the figure. With regard to the question of whether the earning capacity of the wife should be taken into account, I am anxious to express my opinion that it must always depend upon the particular facts of the case. I would be sorry to lay down any general rule about it, but it seems to me that in a case such as this, on these facts it would be wrong to reduce the liability of the husband to maintain his wife by reckoning that the wife could, if she saw fit, go out with her child and earn some money by doing domestic work. The wife in this case is not trained to do any special work—and I do not know that she could do anything else; what she did for a short time was to work in the kitchen for a friend. That arrangement was temporary only and we are told by an affidavit (filed after the decision of the judge) that this work has come to an end and there was no challenge to the bona fides of the statement to that effect. I agree that the appeal should be allowed.

DENNING, L.J. I also agree. A very important matter in awarding maintenance is the conduct of the parties. In this case it has been established that the husband broke up the marriage after twenty-one years of married life, leaving the wife with two children, one of them very young. It was a particularly bad case, because the husband committed adultery with a Swiss student help, who came to the house. After the divorce, the wife claimed maintenance, and the question is whether she ought to go out to work. I agree with my Lords that no general rule can be laid down on the matter, but this wife is certainly under no legal duty to go out to work in order to reduce the maintenance that her husband should pay. It would be quite unreasonable to expect her to do so. She cannot be expected to do it when she has a young child to look after. Of course, if a wife does earn, then her earnings must be taken into account: or if she is a young woman with no children, and obviously ought to go out to work in her own interest, but does not, then her potential earning capacity

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ought to be taken into account; or if she had worked regularly during the married life, and might reasonably be expected to work after the divorce, her potential earnings ought to be taken into account. Except in cases such as these it does not as a rule lie in the mouth of a wrongdoing husband to say that she ought to go out to work simply in order to relieve him from paying maintenance. I agree with my Lords that the appeal must be allowed.

The court ordered maintenance at 4l. a week, less tax, as from the date of decree absolute, credit being given for payments made.

Appeal allowed.

Solicitors: *Hepburns; Gibson & Weldon for Wellington & Clifford, Gloucester.*

C. G. M.

1950
July 5.

JEFFREY v. JEFFREY.

Pearce J.

Husband and wife—Divorce—Application to rescind decree nisi and substitute decree of judicial separation—Power of substitution discretionary—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 183, sub-s. 3—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 9.

On an application by a party against whom a decree nisi has been granted to have the decree made absolute, the court has a full discretion to determine the case as it thinks just. That discretion is in no way fettered by the fact that an application has been made by the innocent spouse for a decree of judicial separation in lieu of the decree nisi which has been pronounced: the manner in which the court's discretion will be exercised must depend entirely on the circumstances of the particular case.

Parsons v. Parsons [1907] P. 331, *Griffiths v. Griffiths* (1912) 28 T. L. R. 281, *Daglish v. Daglish* [1936] P. 49 (decided before the party against whom the decree nisi had been granted was given the right to apply to the court by s. 9 of the Matrimonial Causes Act, 1937) distinguished.

Observations in *Blunt v. Blunt* [1943] A. C. 517, 525 applied.

SUMMONS (adjourned into court).

On July 23, 1935, Alfreda Evelyn Jeffrey presented a petition for judicial separation from her husband, Duncan Campbell Jeffrey, to whom she was married in 1916, making allegations which he denied. On April 29, 1936, the trial began before

Langton, J., and the parties signed terms of agreement to compromise the suit by a deed of separation. The deed, which contained provisions for maintenance, was signed later that year. The parties remained separate and apart, and the husband continued to make payments under the deed. In October, 1949, the wife presented a petition for divorce on the ground that the husband had committed adultery; the allegation was not denied, and on January 9, 1950, the court pronounced a decree nisi of divorce. The wife had applied for maintenance in December, 1949. No application was, however, made by her to have the decree made absolute, and on June 6, 1950, the husband issued a summons to show cause why an order should not be made giving him leave to apply for the decree to be made absolute. On May 25, 1950, the wife had been given notice that the husband intended to apply for a variation of the deed of separation as being a post-nuptial settlement.

The hearing of the summons for decree absolute was adjourned on June 12, 1950, by the registrar on the wife's application, and on June 16, 1950, the wife issued a summons "to show cause why a decree of judicial separation should not be pronounced in lieu of the decree nisi for dissolution of marriage."

In an affidavit in support of that summons the wife stated that she was a Roman Catholic and, as such, opposed on grounds of conscience to divorce; that she had petitioned for dissolution against the dictates of her conscience; and that she now wished the marriage to stand. She further stated that the pronouncement of a decree of divorce might injure her financially, since her husband had applied for a variation of the deed of separation. She desired to maintain her rights under the deed and her rights, should she be widowed, under the Inheritance (Family Provision) Act, 1938.

The husband in his affidavit in reply questioned the sincerity of the wife's conscientious scruples, and stated that he was anxious to marry the woman named in his wife's petition and lead a normal and respectable married life. He contended that his wife's application for maintenance was incompatible with her retaining an election subsequently to abandon her suit or to ask for a decree of judicial separation, and pointed out that in any event such relief as she might be entitled to by statute was entirely in the discretion of the court. He accordingly prayed that the decree nisi should be made absolute.

The matter came before Pearce, J., in chambers, and was adjourned into court for argument.

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C. O. Herd for the wife.

J. A. Petrie for the husband.

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Pearce J.

PEARCE J. [after stating the facts]. The wife's counsel referred to *Parsons v. Parsons* (1), where an alteration from a decree nisi of dissolution to one of judicial separation was allowed. Apparently in that case the wife's desire for the alteration arose mainly from financial motives. Counsel also referred to *Griffiths v. Griffiths* (2) and *Daglish v. Daglish* (3), where similar alterations were made. Financial considerations were taken into account in *Daglish v. Daglish* (3), though those were considerations of the position of the children and not of the wife herself.

Since those cases the position has been altered by s. 9 of the Matrimonial Causes Act, 1937, which has added sub-s. 3 to s. 183 of the Supreme Court of Judicature (Consolidation) Act, 1925 (4). Before the passing of the Act of 1937, a respondent had no rights in the matter. He now has a right to apply to the court, and the court has a full discretion to deal with the case as it thinks just.

It is obviously undesirable to allow a petitioner to use delay or alteration in a decree nisi of divorce in order to put pressure on a respondent husband and to secure from him a financial advantage. There may be certain circumstances where justice is better served by altering a decree nisi of dissolution to a decree of judicial separation. The judge has a complete discretion under the new sub-section, and the manner in which that discretion should be exercised must depend entirely on the circumstances of the particular case.

In this case the wife has stated that she brought her petition for divorce against her conscience, and that she has now reverted to her original feeling that it was wrong to have a divorce. She has said that she wants, instead, a judicial separation. It is clear from the rest of her affidavit that that was not the sole consideration and her arguments have been mainly directed to the financial position.

In my opinion the wife's underlying motive in this case is that she was disappointed at the husband's financial state as revealed in the maintenance proceedings, and that she thinks

(1) [1907] P. 331.

(2) (1912) 28 T. L. R. 281.

(3) [1936] P. 49.

(4) The Supreme Court of Judicature (Consolidation) Act, 1925, s. 183, sub-s. 3 (as added by s. 9 of the Matrimonial Causes Act, 1937):
 "Where a decree nisi has been obtained, whether before or after the passing of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree,

"then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit."

it would pay her better to remain his wife and thus keep, should she survive her husband, her chance of making in the future an application under the Inheritance (Family Provision) Act, 1938. The question of maintenance of the wife is at the moment sub judice in proceedings for maintenance initiated by herself in this suit.

After considering all the facts of the case, and bearing in mind the observations of Lord Simon, L.C., in *Blunt v. Blunt* (5), I have come to the conclusion that the wife's application to rescind the decree nisi of divorce should be refused and that the decree should be made absolute. There will, therefore, be no order on the wife's application to rescind the decree nisi.

*Wife's application refused.
Decree absolute.*

Solicitors: *Alfred Cox & Son, for Clarke & Nash, High Wycombe; Gregory, Rowcliffe & Co., for Neal, Scolah, Siddons & Co., Sheffield.*

J. B. G.

(5) [1943] A. C. 517, 525.

BATER v. BATER.

1950
June 29.

Husband and wife—Divorce—Cruelty—Standard of proof.

Bucknill,
Somervell and
Denning, L.JJ.

On a petition by a wife for divorce, on the ground of cruelty, it is no misdirection for the trial judge to state that the petitioner must prove her case beyond reasonable doubt.

Davis v. Davis [1950] P. 125 considered.

Per Denning, L.J.: The phrase "reasonable doubt" in this connexion, as a standard of proof, can be used just as aptly in a civil or a divorce case as in a criminal case. But had the trial judge said that the case had to be proved with the same strictness as is a crime, that would have been misdirection.

APPEAL from Mr. Commissioner Grazebrook, K.C.

The appellant wife petitioned for divorce on the ground of the alleged cruelty of the respondent, her husband. She admitted adultery on one occasion in her discretion statement. The parties were married in 1938.

The commissioner, dismissing the wife's appeal, found that any cruelty there might have been before 1942 had been condoned, and that it was not subsequently revived by the conduct of the husband. The wife appealed.

The case is reported solely on the question of misdirection.

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Tolstoy for the wife. The commissioner in his judgment said: "That is the evidence, and in order to succeed the wife has to satisfy me that there has been injury to life, limb, or health, "bodily or mentally, or reasonable apprehension of it, and she "has to prove her case beyond reasonable doubt". In that last sentence, it is submitted, the commissioner misdirected himself, since the phrase "beyond reasonable doubt" was to denote the standard of proof applicable in a criminal case: see *Davis v. Davis* (1)

The husband in person.

BUCKNILL, L.J. [on the issue of misdirection]. In my opinion, the commissioner's statement that the wife had to prove her case beyond reasonable doubt was a correct statement of law, and I adhere to what I said in *Gower v. Gower* (2) and *Davis v. Davis* (1). In *Gower v. Gower*, I should perhaps have said: "The standard "of proof required in a criminal case is higher than that required "in *some* civil actions". But, subject to that, I stand by what I then said. I do not understand how a court can be satisfied that a charge has been proved (and the statute requires that the court shall be satisfied before pronouncing a decree) if, at the end of the case, it has a reasonable doubt in its mind whether the case has been proved. To be satisfied and at the same time to have a reasonable doubt seems to me to be an impossible state of mind.

I will just add this: I regard proceedings for divorce as proceedings of very great importance, not only to the parties, but to the State. If a wife is divorced, not only has she that stigma resting upon her for the rest of her life, but it may mean that she will lose the maintenance to which she is entitled from her husband; and she may lose the custody of her children. It may indeed mean ruin to her. I think that, if a high standard of proof is required because of the importance of a case to the parties and also the community, divorce proceedings are the kind of case which requires that high standard. This appeal fails.

SOMERVELL, L.J. With regard to the suggested misdirection, I do not think that the commissioner in the sentence quoted misdirected himself, and I desire to express my agreement with what has been said on that matter by Bucknill, L.J., today and what was said by him in *Davis v. Davis* (1). I agree that the appeal must be dismissed.

DENNING, L.J. The difference of opinion which has been evoked about the standard of proof in recent cases may well turn out to be more a matter of words than anything else. It is of course true that by our law a higher standard of proof is required

(1) [1950] P. 125.

(2) (1950) 66 T. L. R. (Pt. 1) 717.

in criminal cases than in civil cases. But this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard.

As Best, C.J., and many other great judges have said, "in proportion as the crime is enormous, so ought the proof to be clear". So also in civil cases, the case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion. Likewise, a divorce court should require a degree of probability which is proportionate to the subject-matter.

Admission?
I do not think that the matter can be better put than it was by Lord Stowell in *Loveden v. Loveden* (3). "The only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion". The degree of probability which a reasonable and just man would require to come to a conclusion—and likewise the degree of doubt which would prevent him coming to it—depends on the conclusion to which he is required to come. It would depend on whether it was a criminal case or a civil case, what the charge was, and what the consequences might be; and if he were left in real and substantial doubt on the particular matter, he would hold the charge not to be established: he would not be satisfied about it.

But what is a real and substantial doubt? It is only another way of saying a reasonable doubt; and a reasonable doubt is simply that degree of doubt which would prevent a reasonable and just man from coming to the conclusion. So the phrase "reasonable doubt" takes the matter no further. It does not say that the degree of probability must be as high as 99 per cent. or as low as 51 per cent. The degree required must depend on the mind of the reasonable and just man who is considering the particular subject-matter. In some cases 51 per cent. would be enough, but not in others. When this is realized, the phrase "reasonable doubt" can be used just as aptly in a civil case or a divorce case as in a criminal case; and indeed it was so used by my Lord in *Davis v. Davis* (4) and *Gower v. Gower* (5)

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(3) (1810) 2 Hagg. Con. 1, 3.

(5) 66 T. L. R. (Pt. I) 717.

(4) [1950] P. 125.

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to which we have been referred. The only difference is that, because of our high regard for the liberty of the individual, a doubt may be regarded as reasonable in the criminal courts, which would not be so in the civil courts. I agree therefore with my brothers that the use of the phrase "reasonable doubt" by the commissioner in this case was not a misdirection any more than it was in *Briginshaw v. Briginshaw* (6).

If, however, the commissioner had put the case higher and said that the case had to be proved with the same strictness as a crime is proved in a criminal court, then he would, I think, have misdirected himself, because that would be the very error which this court corrected in *Davis v. Davis* (7). It would be adopting too high a standard. The divorce court is a civil court, not a criminal court, and it should not adopt the rules and standards of the criminal court. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Neave and Neave for Broad, Riggall & Godman, Watford.*

C. G. M.

(6) (1938) 60 C. L. R. 336.

(7) [1950] P. 125.

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KASLEFSKY v. KASLEFSKY.

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June 16, 20.

Bucknill,
Somervell and
Denning L.JJ.

Divorce—Cruelty—Wife's gross neglect of husband and child—Laziness—Refusal of sexual intercourse—Conduct not "aimed at" spouse.

Although, as is laid down in *Squire v. Squire* [1949] P. 51, malignity is not an essential element of "cruelty", as that word is used in s. 2 of the Matrimonial Causes Act, 1937, which enacts that a petition for divorce may be presented by husband or wife on the ground that the respondent has, since the celebration of marriage, treated the petitioner with "cruelty", nevertheless, to secure a divorce on that ground, there must be shown on the part of the respondent conduct which is "aimed at", i.e., actions or words actually or physically directed at, the petitioner; or done with intent to injure him, or to inflict misery on him.

Accordingly, where it was shown, as in this case: (1.) that a wife had written to her husband when in the Forces, at war, that she wanted her freedom and no longer wanted to keep the only child of the marriage, but wanted it to be adopted; (2.) that on her husband's return from his service she refused, and continued to refuse, him sexual intercourse; (3.) that she used to stay up late, do no work at

all, and stay in bed late in the morning, being utterly lazy; and (4.) that she grossly neglected the child of the marriage, a boy aged three years; but that none of that conduct was "aimed at" her husband, being due to her temperament and character, it was held that a petition for divorce by her husband on the ground that she had treated him with cruelty was rightly dismissed.

Westall v. Westall (1949) 65 T. L. R. 337 explained and followed.

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APPEAL from Judge Pugh, sitting as a special commissioner in divorce.

The parties were married in 1942, when each was twenty-five years of age. In March, 1943, a son, Alan, was born, and in September, 1943, the husband went overseas in the Forces of the Crown. He stayed overseas until April, 1946.

The appellant husband petitioned for dissolution of his marriage on the ground that his wife, the respondent, had treated him with cruelty. The charges of cruelty included: (1.) that the wife had written to her husband in October, 1944, whilst he was in the Forces, that she wanted her freedom and that she no longer wanted to keep the child of the marriage and wanted it to be adopted; (2.) that she refused her husband sexual intercourse after his return from the Forces; (3.) that she used to stay up late after the rest of the household had gone to bed, do no work at all, and stay in bed late in the morning; and (4.) that she neglected the child, kept him up until 9 p.m., so that the husband was forced to put him to bed, as well as looking after him otherwise, and did not keep the boy very clean. Evidence was given of those facts.

The husband asked for the exercise of the court's discretion as he had committed adultery. He was living with the woman named in his statement, and the court was told that she was pregnant by the husband. He told his wife about the adultery before the petition was filed; but the wife did not appear to the suit, or make any cross-charge of adultery. Nor did she seek to have the custody of the child of the marriage. She appeared to be completely indifferent to the marriage, her husband and her son.

At the conclusion of the trial, counsel for the husband wished to recall a doctor to ask him what was his prognosis as to the husband's health had he continued to live with his wife.

The commissioner, in giving judgment, said: "I see no reason why the doctor should be recalled to be asked that sort of question, particularly as I have no doubt whatever as regards this question of health. I am most assisted by the case of *Westall v. Westall* (1) and I hope I am following the guidance laid down for me by Denning, L.J. I am prepared to find that

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"this wife was lazy—I have used the word 'sluttish'—and
 "neglected her proper duties as a wife and mother, but there is
 "no evidence before me that those acts were what are called
 "intentional acts or aimed specifically at the husband. I have
 "no evidence that those acts amounted to cruelty. I am satisfied
 "of nothing more than that the petitioner was considerably
 "worried. I am quite satisfied that his health was not to any
 "serious extent injured. For all these reasons I refuse to grant
 "a decree".

The husband appealed.

Karminski, K.C., and *J. E. S. Simon* for the husband. We accept the burden of proving that the wife committed wilful and unjustifiable acts against the husband, inflicting pain and misery upon him and injuring his health: *Horton v. Horton* (2). The husband's health was not injured merely by the natural development of the wife's character but by her wilful and unjustifiable conduct towards him. The true principle in cases of this kind is that a spouse must be presumed to intend the natural and probable consequences of his or her own acts. It is not necessary to prove malignity or a deliberate intention to injure: *Squire v. Squire* (3). It is not necessary for a petitioner to prove that the respondent intended to be cruel, provided that her intentional acts amounted in fact to cruelty: *Hadden v. Hadden* (4).

In *Westall v. Westall* (5) it was said by Denning, L.J., that "intention is an element in this sense, that there must be conduct which is in some way aimed by one person at the other". The facts in this case are not stated in the report, and it is submitted that these observations were obiter and inconsistent with the test laid down in *Squire v. Squire* (3). A convenient general test was suggested by Pearce, J., sitting in the Court of Appeal in *Lauder v. Lauder* (6), where he said, "The question is "whether *this* conduct by *this* man to *this* woman, or vice versa, "is cruelty". Having regard to the facts of the present case and the proof of injury to the petitioner's health, it is clear that her conduct amounted to cruelty.

So far as ill treatment to the child is concerned, this is by itself cruelty. That such conduct to a child can be cruelty in law was decided in *Suggate v. Suggate* (7). In *Birch v. Birch* (8) it was held that the ill treatment of a child by a respondent can

(2) [1940] P. 187, 193.

(3) [1949] P. 51.

(4) "The Times", December 5, 1919.

(5) 65 T. L. R. 337.

(6) [1949] P. 277, 308.

(7) (1859) 1 Sw. and T. 489.

(8) (1873) 42 L. J. (P. & M.) 23; 28 L. T. 540.

amount to cruelty if it was of such a nature and extent as to injure the petitioner's health.

The commissioner was wrong in law in not directing himself correctly as to the requirements to support a charge of cruelty and further misdirected himself by relying on the observations of Denning, L.J., in *Westall v. Westall* (9).

The wife did not appear, and was not represented.

Cur. adv. vult.

June 20. The following judgments were read:—

BUCKNILL, L.J. To summarize the judgment of the commissioner, I think that the three points in it are that: (1.) there was no evidence that the acts of the wife were intentional acts or aimed specifically at the husband; (2.) the health of the husband was not to any serious extent injured; and (3.) although it does not appear in the words I have used, the commissioner expresses a very definite view that the wife's conduct amounted to constructive desertion. After the commissioner had given judgment Mr. Simon said: "It must be on a hypothetical basis. I understood your Lordship to say that the wife had deserted the husband?" The commissioner: "Oh, yes, certainly. It looks as though there were all the materials there in the course of time". I mention that because it shows that the commissioner took a serious view of the conduct of the wife; for in order to come to a conclusion that there has been constructive desertion one must clearly be of the view that the conduct of the deserting spouse has been such as in effect to drive the innocent spouse away from home.

First of all, was the commissioner justified in coming to the conclusion that there was no evidence before him that these acts were what are called intentional acts, or aimed specifically at the husband? He stayed overseas until April, 1946. According to his evidence, and I see no reason to doubt it, in October, 1944, whilst he was serving abroad in the Army he got a letter from his wife. He was asked this question: "What did that letter say?" "(A.) It implied my wife wanted her freedom, and she no longer wanted to keep the child; she wanted it to be adopted". Unfortunately, the letter has not been available for the court's use. I do not know what his answer to that letter was, and I do not know what happened thereafter between then and his return home in April, 1946. He said he tried to get home on a compassionate posting and failed, and, when he was repatriated, he was suffering from anxiety neurosis, caused by worrying about his wife. That is his first charge of cruelty.

That raises the point which runs through the whole of this

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case, namely, whether a wife who writes a letter of that kind, provided that she genuinely means what she says, is treating her husband with cruelty. I think that one cannot call such conduct cruelty, if she was weary of her husband and weary of married life and wanted to be free. However reprehensible it may be from a matrimonial point of view, I do not think that it amounts to cruelty.

The next charge made against the wife by the husband is that she refused him sexual intercourse. He says that as soon as he got home she asked for a divorce and she refused to kiss him. They slept one night in the same room and she refused sexual intercourse; on the next night she slept in her mother's room and has slept there ever since; and only on one occasion, after that first night, did he ever ask his wife for sexual intercourse, and she then refused. There again, it seems to me that the matter depends upon the motive behind the wife's conduct. If she had arrived at a state of mind during the years that her husband was overseas which made him quite repugnant to her from a sexual point of view, I think she was not cruel in declining to have sexual intercourse. It may be that she was not complying with her matrimonial vows, and in some respects it may have been reprehensible; but to say that a woman who refuses to have sexual intercourse with a man because he is repugnant to her is being cruel to him seems to me to be a misuse of the word. If it could be proved that she refused intercourse solely because she knew it would injure his health and because she wished to inflict unnecessary pain and suffering on him, that would put the matter in quite a different light; but there is no evidence of that, and the letter which she wrote in October, 1944, seems to contradict it.

The next charge made against her is that she used to stay up rather late after everybody had gone to bed, and that she did not do any work at all, and she stayed in bed late in the morning. As I understand it, during the whole of the time when the husband and wife were living together, after the husband came back from the war, they were living in the house of the wife's mother. The wife's mother owned a newsagent's and bookseller's business and the husband was working in it. No doubt they went off early in the morning to get to their work, and the husband says that the wife's mother did all the cooking and the cleaning, presumably because the wife refused to help in the work. The same remarks apply to that kind of behaviour of the wife as apply to the question of sexual intercourse. There is no evidence that she refused to do these things from any desire to inflict injury upon the husband: she did it because, as the commissioner says, she was sluttish and preferred to stay in bed to getting up. One would like to know a little bit more about the time at which the

husband did get up in the morning, and what he meant when he said that she stayed in bed "late in the morning".

The next charge is one which at one time seemed to have a little more substance in it. The husband said that the boy Alan, who was three years old when he came back from the Army, was neglected by the wife. She kept him up until about nine o'clock in the evening. They quarrelled about that, and he was forced to put the child to bed. When the child cried the wife wanted to go up and bring him down again, and he had to restrain her from doing so. She did not keep him very clean, and when he left for business in the morning she was still in bed and he had to give the boy his breakfast. When he left, the child would be outside her door crying for her to open it and let him go in. He said that either he or his mother-in-law used to wash and bathe the child, because the wife would not do either.

Did that amount to cruelty? We have been referred to *Birch v. Birch* (10), heard before Sir James Hannen in 1873. It was a wife's suit for dissolution in which she alleged as cruelty to her that her husband frequently beat one of her children in her presence, without cause. Sir James Hannen held that that conduct did not amount to cruelty. I will read the material part of his judgment (11): "The cruelty proved by the wife was of this nature: The husband frequently beat one of his children, with great violence and without cause. . . . I have come to the conclusion that consistently with the authorities I cannot find that the petitioner has proved her case as regards cruelty. I must hold fast to the rule of my predecessors, that cruelty must be of such a character that it is dangerous to life, limb or health. In saying that it must be such as is injurious to health, it does not follow that it must actually have reached that point at which injury has been caused. If there is reasonable ground to believe that it will be persisted in so as to cause mischief, then the party may bring the matter into court, because it is not necessary that he or she should wait until violence has actually occurred. . . . With regard to the brutality of the husband towards the child, that cannot be relied upon. I do not say that it could not be under all circumstances; because, undoubtedly, if the evidence showed that the violence was committed upon the child for the express purpose of wounding the feelings of the mother to such an extent as to injure her health it would amount to cruelty. But there is nothing to support such a charge in this case".

That is a clear statement that brutality to the child would not amount to cruelty to the wife, unless it were shown to have been

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(10) 42 L. J. (P. & M.) 23-4; 28 (11) 28 L. T. 540.
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done for the express purpose of wounding her feelings in such a way as to injure her health. The question which one has to consider is whether the law contained in that decision of Sir James Hannen has been modified by the decision of the Court of Appeal in *Squire v. Squire* (12). I do not think that the decision in *Squire v. Squire* (12) has had that effect. In that case the wife was found guilty of cruelty because she made excessive demands on her husband which included requiring him to read to her through the night and preventing him from sleeping; and the Court of Appeal held that the absence of a malignant motive did not prevent that conduct from amounting to cruelty in that particular case.

I would refer to this passage in the judgment of Evershed, L.J. (13): "As I read his judgment, the judge was of opinion "that the absence of any spiteful or malignant intention on the "part of the wife (as he found to have been the fact) was fatal "to the husband's claim. I am unable to agree with this view "of the law. I do not say that proof of such an intention may "not be an important, or, in some cases, even an essential, consideration; but, in the circumstances of the present case, for "reasons which have been stated by Tucker, L.J., and which I "need not repeat, I do not think that proof of such an intention "was a requisite for the husband's success".

When considering what kind of case the Lord Justice had in his mind when he said "that proof of such an intention may be an "essential consideration" it may be relevant to note the argument put forward by Mr. Turner, counsel for the wife. He said (14): "This wife's motives and intention become relevant "when conduct, otherwise innocent, is shown to have had such "an effect on the health of the victim as might amount to cruelty. "Then the state of mind of the party complained of must be "examined. If it can be shown that in a particular case a certain "act was done with the purpose of causing harm, that may be "cruelty"—that may be cruelty.

I venture to think that that is one of the tests which has to be applied: is the conduct of the wife, unless done for the express purpose of injuring the health of the husband, innocent in the sense that it is justified or justifiable under the circumstances? In cases such as refusal of sexual intercourse, or sheer laziness, or neglect of a child, I think that is conduct which is innocent, so far as any charge of cruelty is concerned, unless it is done for the express purpose of causing injury to the health of the complaining spouse.

(12) [1949] P. 51.

(14) Ibid. 54.

(13) Ibid. 60.

The statute which first made cruelty a ground for divorce introduced a new word on the subject. Section 2 of the Matrimonial Causes Act, 1937, which substituted that section for s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925, gave power to the court to grant a decree of divorce if the offending spouse "has, since the celebration of the marriage, treated the "petitioner with cruelty"—"treated" is the verb. The phrase in the earlier Acts was simply "guilty of cruelty". I think that the use of the word "treated" indicates conduct aimed at the offended spouse. I agree with the judgment of Denning, L.J., in *Westall v. Westall* (15), where he said: "Although malignity "is not an essential element of cruelty as *Squire v. Squire* (16) "shows, nevertheless intention is an element in this sense, that "there must be conduct which is, in some way, aimed by one "person at the other".

I therefore think that on the first point the commissioner was justified in coming to the conclusion that this wife had not treated her husband with cruelty, because she had not been guilty of conduct which was "aimed at" the husband and which produced injury to health or reasonable apprehension of injury. That being so, I need not consider the second point, in which, of course, I think that there is substance, namely, that the commissioner said that he was satisfied of nothing more than that the husband was considerably worried. I think that, on the authorities, to prove reasonable apprehension of injury to health would be sufficient, and that the evidence in this case does indicate that there was some reasonable apprehension of injury to health. One must remember, however, that the husband had met the woman with whom he started subsequently to live in adultery in August, 1948, and did not see the doctor on the subject of his health until the autumn of 1948. Autumn is a vague word, and it may be that the injury to the health, of which he complained, sleeplessness and so on, was due to the fact that he had already formed an attachment for the other woman. However, it is not necessary for me to express an opinion on that point, because I think the case fails on the first point, that no conduct amounting to cruelty has been established in this case. That being so, in my view this appeal must be dismissed.

SOMERVELL, L.J. I agree. I agree also with the reasons which have been given by Bucknill, L.J., on the issues raised.

DENNING, L.J. In *Westall v. Westall* (17) we all said, if I remember rightly, that an essential element in cruelty is that

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(15) 65 T. L. R. 337.

(16) [1949] P. 51.

(17) 65 T. L. R. 337.

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there must be conduct which is, in some way, aimed at one person by the other. I adhere to all I there said, but the question now is what is meant by "aimed at".

The conduct of one party can properly be said to be aimed at the other when it consists of actions or words actually or physically directed at him. Then it may be cruelty, even though there is no desire to injure the other or to inflict misery on him. It may consist in a display of temperament, emotion, or perversion whereby the one gives vent to his or her feelings, not intending to injure the other, but making the other the object—the butt—at whose expense the emotion is relieved. The sick wife in *Squire v. Squire* (18) had no desire to injure her husband, but she was guilty of cruelty because she made her husband the butt of her inordinate demands. The moody husband in *Lauder v. Lauder* (19) directed his sulkiness at his wife, although he had no wish to hurt her. So also, the nagging wife in *Usmar v. Usmar* (20). These cases show that, when the conduct consists of direct action against the other, then it is not essential that there should be a specific intent to injure or even to cause distress. Cases of this kind must, however, be carefully watched. Where there is no intent to injure, they are not to be regarded as cruelty unless they are plainly and distinctly proved to cause injury to health.

When the conduct does not consist of direct action against the other, but only of misconduct indirectly affecting him or her, such as drunkenness, gambling or crime, then it can only properly be said to be aimed at the other when it is done, not only for the gratification of the selfish desires of the one who does it, but also, in some part, with an intention to injure the other and to inflict misery on him or her. Such an intention may readily be inferred from the fact that it is the natural consequence of the conduct, especially when the one knows, or it has been brought to his notice what the consequences will be, and nevertheless he does it, careless and indifferent whether it distresses the other or not. But the court is not bound to draw the inference: the presumption that a person intends the natural consequences of his acts is one that may—not must—be drawn. If, in all the circumstances, it is not the correct inference, then it should not be drawn. In cases of this kind, if there is no desire to injure or inflict misery on the other, the conduct only becomes cruelty when the justifiable remonstrances of the innocent party provoke resentment on the part of the other which evinces itself in actions or words actually or physically directed at the innocent party.

(18) [1949] P. 51.

(19) [1949] P. 277.

(20) [1949] P. 1.

This case involves the application of these principles to two matters of common occurrence. (1.) This wife grossly neglected her husband and child, but her conduct was not aimed at him, nor had she any desire to injure him or inflict misery on him; she was simply lazy. It was all very wrong of her, but it was not cruelty. It was a defect of character and temperament which he, having married her, must put up with. It led, no doubt, to discord between them, but gross neglect or chronic discord is not yet a ground for divorce. Even if the wife had herself been cruel to the child, that would not by itself be cruelty to the husband unless there were in some part an intention on her side to inflict misery on him. The converse case of cruelty by a husband to the children has, like habitual drunkenness, been specially made, by statute, a ground on which a wife can obtain an order against him in the magistrates' court: but it has not yet, by itself, been made a ground for divorce. In many cases, however, it will be so likely to cause distress to the wife that the husband may be presumed to have intended in some part to inflict misery on her. In the extreme case where a husband kills a child, the presumption becomes very strong and he may be held to have treated his wife with cruelty, even though he is insane: see the recent decision of Pearce, J., in *Lissack v. Lissack* (21).

(2.) This wife refused her husband sexual intercourse. If there were any ground for inferring that this was with an intention to inflict misery on him it would, I think, be cruelty. The wilful and unjustifiable refusal of sexual intercourse is destructive of marriage, more destructive, perhaps, than anything else. Just as normal sexual intercourse is the natural bond of marriage, so the wilful refusal of it causes a marriage to disintegrate. It gives rise to irritability and discord, to nervousness and manifestations of temper, and hence to the breakdown of the marriage. The law should not look to those outward symptoms only: it should have regard to the underlying cause. If the refusal is persisted in so unreasonably and for so long that the court is able to infer that it was intended to inflict misery on the other, then it may be cruelty. But that is not the case here. The disinclination on the wife's part may have proceeded from a faulty approach on the husband's side, or from ill-health or reluctance on her side, with no intention whatever of affecting him. It was therefore not cruelty.

The result is that the husband's petition must be refused. I cannot help feeling, however, that in this case it might be a good thing if there were a divorce. The wife has shown a complete disregard of her wifely duties. She does not care for her child

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and is quite content for him to be brought up by another woman with whom her husband is now living. It might be a good thing if the union of the husband with this other woman could be regularized. The wife could facilitate this by herself suing for a divorce; but it is for her to decide whether she should do so or not. We cannot find that she has treated her husband with cruelty, simply because she has not done so. If the door of cruelty were opened too wide we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled.

Appeal dismissed.

Solicitors: *Montagu's and Cox & Cardale.*

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Bucknill,
Somervell and
Denning L.JJ.

Husband and wife—Divorce—Cruelty—Condonation—Conditional forgiveness—Conversion into absolute forgiveness in the course of years.

Per Denning L.J.: Where cruelty has been condoned there is conditional forgiveness, the condition being that the guilty party henceforward should behave properly; but ultimately if the guilty spouse has by his good behaviour proved himself worthy of the trust and confidence of the other, the time may come when the proper inference is that the forgiveness is no longer conditional, but has become absolute. The earlier matrimonial offence cannot then be revived.

Accordingly, where a husband and wife cross-petitioned for divorce, on the ground of cruelty, on the assumption that certain episodes which took place some fifteen years earlier amounted to cruelty, since the spouses had lived together a normal married life, without untoward incidents, from January, 1938, to December, 1945, the episodes which occurred before January, 1938, should be regarded as having been forgiven by both spouses absolutely, and they could not be revived by any events occurring after December, 1945.

APPEALS from Mr. Commissioner Grazebrook K.C.

The husband petitioned for divorce on the ground of cruelty. The wife by her answer also asked for divorce on that ground. The commissioner dismissed both petitions, holding that cruelty

had not been proved by either party before 1938 and that, were he wrong in that, it had been condoned and not revived.

Both parties appealed.

Petrie and C. Arnold-Baker for the husband.
Loudoun for the wife.

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BUCKNILL and SOMERVELL L.JJ., gave judgment dismissing the appeals, holding, as a matter of fact, that no cruelty had been proved by either party and that therefore no question arose about its revival.

DENNING L.J. I am prepared to assume that the episodes which took place some fifteen years ago or more amounted to cruelty but, even so, I do not think that they can be made a ground for divorce. *Beard v. Beard* (1) and *Richardson v. Richardson* (2), establish the proposition that condonation is conditional forgiveness, the condition being that the guilty party should henceforward behave properly. He is, so to speak, taken back on probation. The probationary period does not, however, necessarily last for life, and a point may be reached where the guilty party has, by his good behaviour, proved himself worthy of the trust and confidence of the other. The further that past offences recede into the distance, so much the more does it become difficult to revive them, until the time may come when the proper inference is that the forgiveness is no longer conditional, but has become absolute. This view seems to me to meet the objections so forcibly expressed by Vaisey J. in his dissenting judgment in *Beard v. Beard* (1). It is also in accord with what Bucknill L.J. said in *Richardson v. Richardson* (2): "I cannot believe that if adultery has been condoned, say, for seven years, a wife is entitled to say it is revived because the husband has on one occasion slapped her face or has come home drunk, or has done something else which may amount to 'matrimonial misconduct' or 'a breach of conjugal kindness'."

Applying this principle, it appears that from January, 1938, to December, 1945, these parties lived together a normal married life without untoward incidents. In those circumstances the violent episodes which had taken place in the early years of the marriage must be regarded as being forgiven by both sides absolutely and not conditionally. They cannot be revived by the events after December, 1945. The real question, therefore, becomes whether either party after the war was guilty of fresh cruelty sufficient to maintain a suit for divorce.

(1) [1946] P. 8.

(2) [1950] P. 16.



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The husband was then guilty of injudicious and tactless treatment of the sons of the marriage; but that was not aimed at his wife and is not cruelty to her. He was not violent to her, nor she to him. There was chronic discord in the home over the way the boys should be disciplined; but that is not cruelty by either of them. I agree that the appeals should be dismissed.

Appeals dismissed.

Solicitors: *J. E. Lickfold & Sons; Crossman, Block & Co.*

C. G. M.

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Oct. 13, 27.

RISK (OTHERWISE YERBURGH) v. RISK.

Barnard, J.

Husband and wife—Nullity—Moslem ceremony in Egypt—Provision in contract for polygamy—Wife domiciled in England before ceremony—Validity of marriage—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 1.

The matrimonial law of England recognizes no marriage other than one which is monogamous; and notwithstanding the extension of jurisdiction effected by the Law Reform (Miscellaneous Provisions) Act, 1949, a petitioner cannot come to the court in this country either to enforce his rights under, or to seek relief from, a polygamous marriage.

Where, therefore, an Englishwoman domiciled in England went through a Moslem ceremony of marriage in Egypt with an Egyptian domiciled in that country, and where by the marriage contract it was stipulated that the husband might take two, three or four wives at one and the same time, and the wife (after more than three years' residence in this country) petitioned for a decree of nullity on the ground that she was incapable at the time of the ceremony of contracting a polygamous marriage and that the marriage was therefore null and void,

Held, that the marriage was not one which entitled the wife to come to the court for matrimonial relief, and that the court therefore had no jurisdiction to grant her a decree.

Hyde v. Hyde and Woodmansee (1866) L. R. 1 P. & M. 130, applied.

PETITION for nullity of marriage.

The wife by her petition prayed for a decree of nullity on the ground that her marriage to an Egyptian was an unlawful polygamous union. At the time of the ceremony the husband, Abdul Hamid Mustafa Risk, was domiciled in Egypt; the wife was an English subject aged twenty-one years and domiciled in England. The ceremony was performed at the Karmuz religious court in Alexandria in 1938, and constituted a valid marriage according to the law of Egypt.

It was stipulated in the marriage contract, inter alia, that the husband could have two, three or four wives at the same time and that he could divorce his wife (the petitioner) at will. He had not in fact taken another wife, nor sought a divorce.

In 1946, the wife left the husband because of his alleged ill-treatment of her, and returned to England, with the only child of the union; and she remained ordinarily resident in this country until the petition was presented in April, 1950. In her petition she stated that she was a Christian and that she was unaware of some of the conditions of the marriage contract until just after the ceremony. It was stated that she and the husband were domiciled in Egypt.

The petition was undefended.

William Latey, K.C. for the wife. The court's jurisdiction to decree nullity of marriage is just the same as under the Ecclesiastical Court procedure; and if there were any doubt as to the petitioner's right to a decree because the respondent is and always has been domiciled in Egypt she is entitled to come to the court for this remedy under s. 1 of the Law Reform (Miscellaneous Provisions) Act, 1949 (1), having been ordinarily resident in England for three years immediately preceding the date of the petition. There being no doubt about the polygamous nature of this union, it comes within the description of Lord Penzance in *Hyde v. Hyde and Woodmansee* (2), as being no marriage as understood in Christendom or permitted by the law of England. In that case the husband who had entered into what was called a marriage according to the custom of the Mormons petitioned for divorce. Lord Penzance dismissed the petition on the basis that there was no marriage to dissolve.

In the present case this young woman did her best, with the co-operation of the husband, to secure a marriage in an Anglican Church at Alexandria, but the clergyman, not unnaturally, declined. But the Egyptian law in 1938 was covered by the Montreux Convention, 1937, abolishing the Capitulations in

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(1) The Law Reform (Miscellaneous Provisions) Act, 1949, s. 1, sub-s. 1: "The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if—(a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings; and (b) the husband is

" not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man."

Sub-s. 2: "Without prejudice to any jurisdiction exercisable by the court apart from this section, the foregoing provisions of this section shall apply to proceedings for nullity of marriage as they apply to proceedings for divorce."

(2) (1866) L. R. 1 P. & M. 130.

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Egypt, art. 29 of which provided that the fundamental conditions of the validity of marriage should be governed by the national laws of each of the parties thereto, and not merely by the national law of the husband; so that even according to Egyptian law the marriage was invalid.

Recent cases in which the English Divorce Court has treated as valid polygamous marriages, *i.e.*, *Srini Vasan v. Srini Vasan* (3) and *Baindail v. Baindail* (4), must be distinguished because they only concerned the marriages of Hindu or Moslem men and women in their own countries where polygamy was the custom. There appears to be no case in which an English Christian's marriage in a foreign country to a person whose national law permits polygamy has been recognized as valid by the English Divorce Court.

On the other hand, there are a number of reported cases in which English courts other than the Divorce Court have found invalid a marriage which was not permitted by the English law governing fundamental capacity to marry, *e.g.*, *In re Bethell* (5), where an Englishman went through a form of marriage with a native woman according to native rites which sanctioned polygamy, and *In re Paine* (6), where an Englishwoman went through a form of marriage in Germany with her deceased sister's husband, contrary to the law of affinity in England at that time but good according to German law. In *Brook v. Brook* (7), where an Englishman's marriage in Denmark to his deceased wife's sister was declared void, it was laid down that if a marriage abroad of English subjects domiciled in England was polygamous or incestuous it was void. So here the wife is entitled to a declaration of nullity.

Cur. adv. vult.

Oct. 27. BARNARD, J., reading his judgment, stated the facts, referred to s. 1, sub-ss. 1 and 2, of the Law Reform (Miscellaneous Provisions) Act, 1949, and continued: The question which I have to consider is in what sense the terms "husband" and "wife" are used in s. 1 of the Act of 1949. Lord Penzance in his judgment in *Hyde v. Hyde and Woodmansee* (8) said: "But I expressed at the hearing a strong doubt whether the union of man and woman as practised and adopted among the Mormons was really a marriage in the sense understood in this, the Matrimonial Court of England, and whether persons so united could be considered 'husband' and 'wife' in the sense in which these words must be interpreted in the Divorce Act.

(3) [1946] P. 67.

(4) [1946] P. 122.

(5) (1888) 38 Ch. D. 220.

(6) [1940] Ch. 46.

(7) (1861) 9 H. L. C. 193.

(8) L. R. 1 P. & M. 130, 133.

“ Further reflection has confirmed this doubt, and has satisfied me that this court cannot properly exercise any jurisdiction over such unions ”.

In *Srini Vasan v. Srini Vasan* (9) and *Baindail v. Baindail* (10) all that the court decided was that a man who was domiciled in a country which permitted polygamy, and had contracted a valid polygamous marriage in that country, had the status of a married man according to the law of his domicile and was therefore incapable of contracting a subsequent valid marriage in England; and in the latter case Lord Greene, M.R., (11) referred to the passage which I have quoted from Lord Penzance’s judgment and stated that, rightly or wrongly, the courts had refused to regard a polygamous marriage as one which entitled the parties to come for matrimonial relief to the courts of this country.

Lord Stowell said in *Lindo v. Belisario* (12) that marriage, as understood by English matrimonial law, was a contract according to the law of nature, antecedent to civil institution, and might take place wherever two persons of different sexes engaged, by mutual consent, to live together; and according to Lord Penzance in *Hyde v. Hyde and Woodmansee* (13), marriage, as understood in Christendom, might be defined as the voluntary union for life of one man and one woman to the exclusion of all others. Both definitions of marriage stress its monogamous character; and the matrimonial law of England recognizes no other marriage.

It therefore seems to me to be clear that in spite of the extension of the jurisdiction under the Law Reform (Miscellaneous Provisions) Act, 1949, a petitioner cannot come to this court either to enforce rights under or seek relief from a polygamous marriage; and in view of the decision of the Court of Appeal in *De Reneville v. De Reneville* (14), it is my opinion that such a marriage, if it is voidable, is also excluded from the jurisdiction of this court. Is such a marriage, if void ab initio, equally excluded?

If English law regards such a polygamous marriage as the one now before me as no marriage, it might seem at first sight that there could be no objection to the court’s saying so, for the decree would be declaratory. But this would mean that a successful petitioner would have the right to apply for maintenance and for custody; it would also mean that if the present petitioning wife were the second, third or fourth wife of the husband, the court would still have to entertain her petition, for under Moslem law the first wife is no more the wife than the remaining three. In the case now before me, although the ceremony was in Arabic, a language which the wife did not understand, I am satisfied that

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(9) [1946] P. 67.

(10) [1946] P. 122.

(11) *Ibid*, 126.

(12) (1795) 1 Hagg. Con. 216, 230.

(13) L. R. 1 P. & M. 130, 133.

(14) [1948] P. 100.

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she realized that it was a ceremony of marriage according to Moslem rites, and that those rites permit of other wives. The wife entered into this marriage contract with full knowledge of its polygamous character, and now on that very ground she seeks to have it set aside.

On this aspect of the matter the words of Lord Penzance in *Hyde v. Hyde and Woodmansee* (15) are very much to the point. He said: "Is the court, then, justified in thus departing " from the compact made by the parties themselves? Offences " necessarily presuppose duties. There are no conjugal duties, " but those which are expressed or implied in the contract of " marriage. And if the compact of a polygamous union does not " carry with it those duties which it is the office of the marriage " law in this country to assert and enforce, such unions are not " within the reach of the law. So much for the reason of the " thing ".

Lord Penzance concluded his judgment thus: "All that is " intended to be here decided is that as between each other they " are not entitled to the remedies, the adjudication, or the relief " of the matrimonial law of England ". Lord Greene, M.R., in *Baindail v. Baindail* (16) referred with approval to that passage. Although in *Hyde v. Hyde and Woodmansee* (17) Lord Penzance was concerned with a petition for dissolution, I feel satisfied that he advisedly used the word "adjudication ". This court, therefore, has no jurisdiction to entertain this petition, and it must be dismissed.

Petition dismissed.

Solicitors: *Cooper, Bake, Fettes, Roche & Wade.*

J. G. B.

(15) L. R. 1 P. & M. 130, 137.

(17) L. R. 1 P. & M. 130.

(16) [1946] P. 122, 126.

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 Apl. 28;
 May 1, 2, 3.
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 Willmer J.

KNOWLES v. ATTORNEY-GENERAL.

Legitimacy—Petition—Jurisdiction—"Parent or remoter ancestor"—Construction—Whether uncle included—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 188—Legitimacy Act, 1926 (16 & 17 Geo. 5, c. 60), s. 1; s. 2, sub-s. 1—R. S. C. Ord. 25, r. 5.

Although a person may become legitimated under s. 1 of the Legitimacy Act, 1926, irrespective of any declaration to that effect,

nevertheless the court has no jurisdiction to entertain a petition for a declaration of legitimacy under the combined operation of s. 2, sub-s. 1 of that Act and s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925, where that declaration is prayed in respect of the uncle of the petitioner; for an uncle is not a "parent or remoter ancestor" for the purposes of s. 2, sub-s. 1 of the Act of 1926.

Construction of the word "ancestor" in *Zetland (Earl) v. Lord Advocate* (1878) 3 App. Cas. 505, 518, 520, distinguished.

The court cannot make a declaration of legitimacy or legitimation under its inherent powers in respect of declaratory judgments as regulated by R. S. C., Ord. 25, r. 5, or otherwise than in pursuance of the powers conferred by the Legitimacy Declaration Act, 1858, or the Legitimacy Act, 1926, s. 2.

Warter v. Warter (1890) 15 P. D. 35, followed.

LEGITIMACY PETITION under the joint operation of s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925, and the Legitimacy Act, 1926, as amended by s. 19, sub-s. 3, of the Administration of Justice Act, 1928.

The petitioner, Townley Rigby Knowles, claimed by his petition a declaration that two of his deceased uncles were legitimated under the Legitimacy Act, 1926. In the course of the argument an amendment was allowed claiming in the alternative a similar declaration under the inherent jurisdiction of the court and R. S. C. Ord. 25, r. 5.

The petitioner's grandparents, who were at all material times domiciled in England and English nationals, had four children, all sons. Of these, three were born before marriage, and one, the petitioner's father, after marriage. The petitioner was the only grandchild, and no question arose as to his legitimacy, since he was born after his parents' marriage.

Of the petitioner's three paternal uncles, one died in 1919. The present suit was concerned with the other two, Arthur Townley Knowles, who died in 1939, and Alexander Townley Knowles, who died in 1947. The Legitimacy Act, 1926, came into force on January 1, 1927. Both died in France, and the validity of their respective wills or of certain dispositions in them was questioned in the French courts. In both cases appeals were pending at the time of this suit. The French suits were independent of each other.

The plaintiffs in the French suit concerning Arthur Townley Knowles' will were his brother Alexander (since deceased) and his nephew, the present petitioner. The local Court of Appeal at Pau in 1943 held in effect that unless and until a declaration of legitimacy had been made in respect of Arthur and Alexander,

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such as is provided for by s. 2 of the Legitimacy Act, 1926 (1), neither of the plaintiffs (Alexander and the present petitioner) had any locus standi as "heir" to Arthur. An appeal was lodged from that decision to the Cour de Cassation, which the petitioner desired to continue now that his uncle Alexander, co-plaintiff with him in that suit, had died. It was necessary to show his relationship.

In the French litigation concerning Alexander Townley Knowles' will, the petitioner was the sole plaintiff. He succeeded in the court of first instance at Pau in December, 1948, in impeaching on the grounds of undue influence the gift in Alexander's will of his chateau to his bailiff and the latter's wife. The objection that the petitioner might have no locus standi as "heir" of Alexander was not taken at first instance in this suit. Alexander's will appointed no executors and no residuary legatee. The appeal of Alexander's bailiff and his wife was expected to be heard in the Court of Appeal at Pau shortly after the hearing of the present petition; and it was expected that the question of Alexander's legitimacy and the petitioner's locus standi in the French suit would be raised in view, especially, of the decision of the Court of Appeal at Pau in the earlier suit concerning Arthur's will. Moreover there was property of Alexander's in France to which the petitioner would be entitled as "heir" if his relationship to Alexander as nephew were to be established as a matter of English law.

In the present petition, the persons who might be adversely affected under testamentary dispositions of Arthur Townley Knowles and Alexander Townley Knowles had been served and acknowledged service, but only the Attorney-General appeared as respondent.

The question arose whether the court had jurisdiction under s. 2 of the Act of 1926, that is to say, whether an uncle was "a parent or remoter ancestor". The court, however, heard the relevant evidence before deciding the question of jurisdiction.

Salt K.C. and *R. J. A. Temple* for the petitioner. The petitioner has established by strict proof, and it is now in effect conceded, (1.) that he, who was born legitimate, is the nephew of his paternal uncles Arthur Townley Knowles and Alexander Townley Knowles; and (2.) that both of those uncles became legitimated in English law as from January 1, 1927, by virtue of

(1) Legitimacy Act, 1926, s. 2, sub-s. 1 (as amended): "A person claiming that he or his parent or any remoter ancestor became or has become a legitimated person may, whether domiciled in England or elsewhere and whether a British

"subject or not, present a petition under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188, and that Act, subject to such necessary modifications as may be prescribed by rules of court, shall apply accordingly".

the Legitimacy Act, 1926, inasmuch as each of them survived the date of its coming into operation. This was effected by the substantive provisions of s. 1, irrespective of any declaration to that effect under s. 2: see *M. v. M.* (2); *Colquitt v. Colquitt* (3). It is true that there the finding of legitimacy was made, in the course, in the former case, of a suit relating to custody, and, in the latter, of a suit relating to maintenance. But here there are two French suits on foot in which appeals are pending; they relate to succession; and to the petitioner's locus standi as nephew and "heir" of his uncles, as to which the French courts look to English law as the governing law. In hearing the suit relating to Arthur's will in 1941 under the Vichy régime, and the appeal in 1943 during the German occupation, the French courts were precluded from obtaining expert evidence as to the true effect of the English Legitimacy Act, 1926: the error which they made in that litigation may be followed by the Cour de Cassation in hearing the pending appeal therein, and also in the appeal, in the litigation concerning Alexander's will, pending in the District Court of Appeal at Pau—i.e., the error that a declaration of legitimation under s. 2 is necessary in English law as a condition precedent to legitimacy under s. 1. In the absence of any convention between the French Republic and the United Kingdom under the Foreign Law Ascertainment Act, 1861, (which in any case the French courts could not be compelled to invoke) it would be an act of comity for this court to assist the French courts by affording the petitioner declaratory relief unless it is clearly precluded from doing so.

This suit is in no sense *ex parte*: the Attorney-General is only concerned to protect the public interest and put the petitioner to proof. All other interested parties have been served.

In re Wicks' Marriage Settlement (4) concerned the construction of a settlement, and is distinguishable.

Unless the Attorney-General declines, this application could be treated, in view of the case established by the evidence, as an informal special case stated for the opinion of this court under Ord. 34, r. 1, as was done in *R. E. Jones Ltd. v. Waring & Gillow Ltd.* (5) without the Court of Appeal declaring such a course wrong (6).

This court may also have a general inherent jurisdiction to give declaratory relief only, as regulated by R. S. C. Ord. 25, r. 5, notwithstanding *Warter v. Warter* (7) which was tried in the light of the much narrower scope of the Legitimacy Declaration Act, 1858, and the editorial comment in the Annual Practice, 1949, at p. 454.

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(2) [1946] P. 31.
 (3) [1948] P. 19.
 (4) [1940] Ch. 475.

(5) [1925] 2 K. B. 612.
 (6) *Ibid.*, 625.
 (7) (1890) 15 P. D. 35.

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The main question as to jurisdiction for making a declaration of legitimation must however turn on s. 2 of the Legitimacy Act, 1926, whereby one may petition in respect of oneself, one's parent, or "*any remoter ancestor*". The last words are an extension of those in the Legitimacy Declaration Act, 1858, and s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925. And since the Act of 1926 is an enabling Act, passed after the Act of 1925 and the Administration of Estates Act, 1925, took effect, it would be strange if those words did not enable any relative with an economic interest in the legitimacy of the *præpositus*, or at any rate any of the statutory next of kin under the new code of succession, to petition. The Act of 1926 is even more concerned with property and succession to property than with status. Section 2 is more than the historical successor of the Act of 1858.

The court will approach the construction of s. 2 in that setting, not with a view to narrowing or disclaiming its jurisdiction, but liberally. In the fasciculus of sections of the Supreme Court of Judicature (Consolidation) Act, 1925, which contains s. 188, is s. 192. For the purposes of the latter section a liberal interpretation to enable variation of settlements has recently been placed on "settlement": see *Gunner v. Gunner and Stirling* (8); *Bown v. Bown* (9).

"Ancestor" has never been confined in English law to a direct lineal ascendant. An uncle has been held by the highest authority to be an ancestor for the purpose of the Succession Duty Act, 1853: *Zetland (Earl) v. Lord Advocate* (10) per Lord Hatherley L.C., per Lord Selborne, and see per Lord Blackburn. That case, like this, was concerned with succession to property, and if for purposes of imposing a higher rate of tax on the subject the proposition held, a fortiori it must hold in an enabling statute like the Legitimacy Act, 1926. The ancient writ of mort d'ancestor lay for disseisin (on abatement by a stranger) at the suit of the ancestor's nephew.

Etymologically "ancestor" means "antecessor" or predecessor in title. Skeat's Etymological Dictionary gives this as the primary meaning. Popularly "ancestors" includes "predecessors" (including uncles) as well as "lineal ascendants". A man may properly speak of a portrait of his uncle Toby as among the portraits of his ancestors.

The court will not exclude the older of two popular meanings of "ancestor" merely because the newer has become equally or better known. The absence, in Murray's Oxford English Dictionary, of the definition of ancestor as a "predecessor in

(8) [1949] P. 77.

(9) [1949] P. 91.

(10) (1878) 3 App. Cas. 505, 518, 520, 524.

“title” is a lapse. “Remoter” merely means less nearly related. In Norman-French a “parent” is not limited to a lineal ascendant.

The phrase “he or his parent or remoter ancestor” in sub-s. 2 of s. 1 of the Act of 1926 is not exactly correlative with the phrase “him, his spouse, children or more remote issue” in sub-s. 3. Moreover, the former is contained in a procedural section, contemplating the newly enacted range of next of kin under the Administration of Estates Act, 1925, and concerned with the range of persons entitled to petition; whereas the latter is embodied in a substantive section which changed the law of succession.

There is no need to draw a strict line between who may, and who may not, petition under s. 2, if the court is satisfied that the present petitioner may do so in respect of his two paternal uncles.

J. E. S. Simon for the Attorney-General. On the evidence the petitioner’s uncles became legitimated under s. 1 of the Legitimacy Act, 1926. But the court has no jurisdiction to declare their legitimation.

The court will, where it is necessary for the determination of some substantive right, such as custody, maintenance, administration in title to property, make a finding that a person is legitimate or illegitimate; but such a finding is inter partes, and will only bind the *præpositus* if he has himself asserted a claim. The law views jealously the right to petition for a formal declaration of legitimacy or legitimation which would be binding in rem, because if such a petition fails it establishes illegitimacy, and therefore could be misused as a petition for bastardization.

There is no jurisdiction to make a declaration of legitimacy except under the Legitimacy Declaration Act, 1858, and the Supreme Court of Judicature (Consolidation) Act, 1925, s. 188, or a declaration of legitimation except under the Legitimacy Act, 1926, s. 2. Thus there is no such jurisdiction under R. S. C. Ord. 25, r. 5: *Warter v. Warter* (11); *Yool v. Ewing* (12); and see notes in the Annual Practice. The reasoning in those cases also applies to an attempt to secure a declaration of legitimacy by way of special case stated under R. S. C. Ord. 34, r. 1. The procedure laid down by that rule has in any event not been adopted in this case.

The petitioner must therefore bring himself within the Legitimacy Act, 1926, s. 2, and satisfy the court that his uncle was his “ancestor”. Later, “predecessor” became the term used in relation to a corporation sole: see *Cowell’s Interpreter* (1727), *Jacob’s Law Dictionary* (1835). Under the feudal land

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law a predecessor in title to an estate was (apart from corporations sole) necessarily a blood relation; and "ancestor" therefore came to mean by extension a blood relation who was a predecessor in an estate. This is its meaning in the assize of mort d'ancestor; and this is still the modern technical meaning with reference to succession under the old land law. But since the usual blood relations who preceded in an estate were lineal ascendants, "ancestor", again by extension, came to mean a "progenitor", replacing the word "forefather". This is its modern popular meaning, and is the only relevant meaning listed by Murray's New Oxford English Dictionary. Blackstone's Commentaries (18th ed.), vol. 2, pp. 200 et seq. shows the word used both in its technical and in its modern and popular meaning (e.g., "common ancestor").

In statutes affecting men and women in their ordinary relations words are to be construed in their popular sense: see e.g., Maxwell on The Interpretation of Statutes (9th ed.), p. 3. The Legitimacy Act, 1926, is such a statute. "Ancestor" will therefore be construed in its popular sense, as a progenitor, and not in its technical sense, as a predecessor to an estate. The American decision in the New York Court of Appeal in *Valentine v. Weatherall* (13) notes the distinction and is in point. *Zetland (Earl) v. Lord Advocate* (14) was a decision under the Succession Duty Act, 1853, which was directly concerned with succession to real property under the old law; and "ancestor" was in consequence construed in that case in its technical sense.

"He or his parent or remoter ancestor" in s. 2 of the Act of 1926 is correlative with "him or his spouse, children or remoter issue" in s. 1, sub-s. 3, of that Act, and similar phrases in s. 3, sub-s. 1, s. 4, s. 5, and s. 8, sub-s. 2. On no view can "children or remoter issue" include nephews, whether in popular language, etymology, or law: see *Slater v. Dangerfield* (15). When it is desired to indicate a collateral in the Act, the word "relative" is used: see s. 7.

The mischief which the Act was intended to rectify was not to give a blood relation with an economic interest a locus standi to petition in order to establish his right, for he could do that by using the ordinary processes of the court for establishing rights: it was to give a locus standi to a person to petition to remove the stigma of illegitimacy from his line, or the bar sinister from his arms, which he could not otherwise do. By restricting the meaning of ancestor to progenitors, only those persons can petition who have an interest in establishing legitimacy: the construction sought by the petitioner would enable collaterals to petition whose

(13) (1860) 31 Barbour N. Y. 655,

(15) (1846) 15 M. & W. 263, 272.

(14) 3 App. Cas. 505.

real object might be to establish bastardy. That construction would also involve an artificial and illogical distinction between relatives with an interest, who could petition, and strangers in blood (including a spouse), with a similar interest, who could not; and between relatives with an economic interest and those without such an interest. It would, finally, lead to the absurdity that, since a grandfather is a blood relation to his grandson, and may have an ascertainable economic interest in his estate, the grandson would be the "ancestor" of his grandfather.

Salt K.C. in reply. There are two popular meanings of "ancestor", one of which includes an uncle. The primary purpose of the Legitimacy Act, 1926, is in connexion with the devolution of property, and it would be capricious to attribute to the legislature an intention to exclude from the class entitled to petition any relative who under the Administration of Estates Act, 1925 (then recently passed), had an economic interest in establishing the legitimacy of an intestate. The limit on the class is coincident with the limit of next of kin under the Administration of Estates Act, 1925.

If the Act of 1926 were concerned only with status and removing a bar sinister from one's arms, then a petitioner petitioning in, say, a hundred years' time, could take advantage of s. 2 in respect of a very remote lineal ascendant's legitimacy for sentimental reasons, but would be debarred from taking advantage of it to establish a succession to his deceased uncle's property. A bachelor may speak of his collaterals as his family, and so may a nephew speak of his uncle as his ancestor.

The adjective or procedural law laid down in s. 2 is not necessarily correlative with the substantive law laid down in other sections. For the substantive law one must look also to the Administration of Estates Act, 1925. Section 2 of the Act of 1926 is designed to give a remedy whenever a relative has a succession under the combined operation of the Administration of Estates Act, 1925, and the Legitimacy Act, 1926. The latter expressly refers to the former in s. 11.

There could be no more abuse of s. 2 of the Act of 1926 than of the Act of 1858. In each case the Attorney-General is required to be a party to prevent abuses such as petitions for declarations of legitimacy or legitimation being used perversely to establish bastardy.

WILLMER J. The prayer in the petition as originally drawn was for a declaration in pursuance of s. 2 of the Legitimacy Act, 1926, but I have in the course of the argument allowed an amendment claiming in the alternative a similar declaration under the inherent jurisdiction of the court. It is clear that the petitioner has an abundant interest in establishing the legitimation of his

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two uncles. The real question which I have had to decide is whether or not in the circumstances I have jurisdiction to make the declaration asked for. That is by no means a simple or easy problem, and I will say at once that I could have wished to have had an opportunity of thinking it over and of putting my judgment into writing; but it has been represented to me that my view of the matter is required by the petitioner at an early date, in view of certain proceedings which are about to take place in France, and it appears obvious to me that if I take time for consideration what I might have to say may well be too late to assist in the French litigation. [His Lordship then considered the facts and continued:—]

It has been argued on behalf of the petitioner (and so much has not been contested on behalf of the Attorney-General) that the French court acted upon a wrong view of English law in the case concerning the will of the petitioner's uncle Arthur. It is contended that, even without a declaration, both Arthur and Alexander Townley Knowles were automatically legitimated on January 1, 1927, under s. 1 of the Legitimacy Act, 1926. It is said that, had proper evidence as to English law been available to the court in France when this matter was determined during the war, the French court could not possibly have reached its decision that the plaintiffs had no locus standi. *M. v. M.* (16) and *Colquitt v. Colquitt* (17) have been cited in support of the proposition that no declaration of legitimacy was necessary. Having heard the evidence, I am satisfied that the petitioner has proved the necessary facts to bring his uncles Alexander and Arthur within s. 1 of the Legitimacy Act, 1926. If that were the only question before me I should have had no difficulty in following *M. v. M.* (16) and *Colquitt v. Colquitt* (17), and I should have held that, even without a declaration of legitimacy, the petitioner's uncles, Alexander and Arthur, were, on a true view of English law, duly legitimated by the mere fact of surviving the date upon which the Act came into force, namely, January 1, 1927. Unhappily for me, however, that is not the real point which I have to decide, which is whether I have jurisdiction to make a declaration under s. 2 of the Act, or, alternatively, to make a declaration under the inherent powers of the court and more particularly under the provisions of Ord. 25, r. 5, or Ord. 34, r. 1.

Although most of the argument has been directed to the question whether the petitioner has brought himself within the range of persons who can petition under s. 2 of the Act of 1926, it might be convenient if I disposed of the alternative contentions first, namely, that this court can make a declaratory judgment, apart

(16) [1946] P. 31.

(17) [1948] P. 19.

altogether from s. 2 of the Legitimacy Act, 1926, under its inherent powers as regulated by Ord. 25, r. 5, or that, alternatively, a similar result could be achieved by following the procedure laid down in Ord. 34, r. 1, which concerns special cases. Counsel referred to *R. E. Jones Ltd. v. Waring and Gillow Ltd.* (18) in support of the latter contention, and to the procedure which was adopted in that case (19).

I have no difficulty in rejecting the argument in so far as Ord. 34, r. 1, is concerned. No special case has in fact been stated here, and the rule contemplates a special case in writing, divided into paragraphs, numbered consecutively, and so on. The Attorney-General, through his counsel, has not seen fit to accept the suggestion that the opening by the petitioner's counsel should be treated as an agreed statement of facts. That is more or less what was done in *R. E. Jones Ltd. v. Waring and Gillow Ltd.* (18), and, in the absence of any such concurrence or acceptance of the facts stated by the petitioner, the procedure prescribed by Ord. 34, r. 1, admittedly cannot apply.

The alternative claim under Ord. 25, r. 5, is perhaps slightly more formidable, although I have no hesitation in rejecting the contention that I can make a declaration of this character under the powers regulated by that rule. If it were competent to make a declaration in that way in pursuance of Ord. 25, r. 5, it would never have been necessary, as I see it, to enact s. 2 of the Legitimacy Act, 1926, at all. It has been urged, I think properly, by counsel for the Attorney-General that a declaration of legitimacy is, if I may use the expression, something peculiarly sacred because it is a judgment binding in rem. It has been pointed out that the court would not shrink from deciding a question of legitimacy inter partes where that was necessary for the proper disposal or determination of some question arising in an action. That, of course, would only be a judgment inter partes, but it is clear, and there is good authority for the proposition, that the court will not lightly embark upon making a declaration binding in rem except where it is specifically authorised by statute. *Warter v. Warter* (20) is authority on that point. In that suit Butt J. approached the matter by asking himself this rhetorical question (21): "How can you say that this claim for a declaration of legitimacy is brought properly before me, when the Legitimacy Declaration Act prescribes that it shall be brought before me by petition and not by writ?" A writ had been issued in that case, and it was sought to include with another matter a prayer for a declaration of legitimacy. Butt J. properly ordered that prayer to be struck out. It is said that that decision is no

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(18) [1925] 2 K. B. 612.

(19) *Ibid.*, 625.

(20) 15 P. D. 35.

(21) *Ibid.*, 36.

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longer binding on me, because it was arrived at with reference not to this Legitimacy Act, but to the earlier Act of 1858, which is now replaced by s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925. I do not follow that objection. The only effect of s. 2 of the Legitimacy Act, 1926, is to make available to a wider range of persons the facilities to present a petition which were provided by the Legitimacy Declaration Act, 1858, and preserved in s. 188 of the Act of 1925. In my opinion a petition under the modern Act is entirely in *pari materia* with a petition under the previous Act. In those circumstances I consider that I am precluded by a decision now sixty years old from making a declaration of legitimacy otherwise than in pursuance of the powers conferred by statute.

I was also referred to the Irish case of *Yool v. Ewing* (22). That decision is not, of course, binding upon me, but a similar matter was very carefully considered in that case by the Irish Court of Appeal, and that court came to much the same conclusion as that reached by Butt J. in *Warter v. Warter* (23). Having particular regard to the care with which the Irish Court went into the whole matter and gave their decision, I am bound to treat *Yool v. Ewing* (22) as a decision which demands respect.

The view of the editors of the Annual Practice is certainly open to no doubt at all. On page 454 of the 1949 edition it is stated in the notes to Ord. 25, r. 5: "A declaration of legitimacy "cannot be made under this rule: it can only be made on petition "under s. 188 of the Judicature Act", and *Warter v. Warter* (23) and *Yool v. Ewing* (22) are cited. The text continues: "... or "in the case of children legitimated under the Legitimacy Act, "1926, by a petition under s. 2." For the reasons which I have given I consider that the view expressed by the editors of the Annual Practice is the right view.

I come back, therefore, to the main question in this case, namely: is it competent for me to make the declaration asked for under s. 2 of the Legitimacy Act, 1926?

The powers of this court to make declarations of legitimacy are, as I have stated, entirely the creatures of statute, and those powers are derived from the two statutes to which I have referred, namely, the Act of 1858, which is now embodied in s. 188 of the Act of 1925, and s. 2 of the Legitimacy Act, 1926, which, in effect, extended the relief prescribed by s. 188 of the Act of 1925 to the case of persons who desired to claim either that the petitioner or the parent or any remoter ancestor of the petitioner had become legitimated.

The question which arises in this case is whether the petitioner's uncles, Alexander and Arthur, in respect of whom this

(22) [1904] 1 I. R. 434.

(23) 15 P. D. 35.

declaration is sought, can properly be regarded as being "remoter "ancestors" within the meaning of s. 2, sub-s. 1 of the Act of 1926. That is the phrase upon the consideration of which the whole of this question turns: what is meant by "any remoter "ancestor"? It has been contended on behalf of the petitioner that that expression is apt to include any blood relation in whose legitimacy or in whose legitimation the petitioner has an economic interest, whether by succession or otherwise. Mr. Salt, for the petitioner, rather shrank from drawing an exact line between those relations included under that definition and those excluded; but he contended that, on any view, the relationship contemplated must at least include the statutory next of kin listed in the Administration of Estates Act, 1925. Furthermore, he quite wisely said that it did not really matter for the purpose of this case where the line were drawn, because, on his contention, upon any view, this case (being concerned with uncles) must fall well on the right side of the line wherever it be drawn.

As will have been gathered from what I have just said, I was invited on behalf of the petitioner to view this Act, and more particularly s. 2, against the background of the property legislation of 1925, and, in the light of that legislation, to give the Act a wide and liberal interpretation. It was pointed out quite correctly that the Act of 1926, taken as a whole, is not only concerned with the status of the petitioner or the legitimated person, but is also very much concerned with property rights. It relates specifically to property in s. 2, sub-s. 2, and in s. 9; and ss. 3, 4 and 5 concern questions of interest in property and succession to property.

It is said on behalf of the petitioner, in support of the contention that the Act should be interpreted in a liberal way, that the precedent of liberal construction which was adopted by this court in relation to s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925 (which concerns the power of this court to vary ante-nuptial or post-nuptial settlements) should be followed. This court accepted, in *Gunner v. Gunner and Stirling* (24), a very loose and popular definition of the word "settlement", an interpretation which doubtless shocked the practitioners of Lincoln's Inn. That case is cited as a useful analogy, which I might well follow in this case, for giving a liberal interpretation to this statute, which is described by Mr. Salt as an "enabling" statute.

So far as the Legitimacy Act, 1926, is concerned, neither side has been able to produce any direct authority as to the construction of the word "ancestor". But an authority of the House of Lords was cited by counsel for the petitioner with regard to the

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meaning of "ancestor" in another connexion, namely, *Zetland (Earl) v. Lord Advocate* (25). I do not propose to rehearse the complicated facts of that case. It is sufficient to say that the question at issue concerned the rate of succession duty payable under the Succession Duty Act, 1853. A nephew had there in fact succeeded his uncle—an interesting circumstance, because the relationship in question in this case is the same. Two rates of succession duty were provided by the Act: one rate if the succession was by virtue of a disposition of the settlor, another, and higher rate, if it was by devolution. The House of Lords held that in the circumstances the succession was a succession by devolution from the uncle, who was held to be an "ancestor" within the meaning of the relevant section (s. 2) of that Act, of which the material part is in the following terms: "... The 'term 'predecessor' shall be the settlor, disponent, testator, 'obligor, ancestor, or other person from whom the interest of the 'successor is or shall be derived'. Against the background of that section it is interesting to quote the views of Lord Hatherley and Lord Selborne upon the true construction of the word "ancestor" in relation to that statute.

Lord Hatherley said (26): "The expression 'ancestor' is "perfectly accurate in a case of this kind. The word 'ancestor' "is properly assignable to the person who really preceded in the "estate, although that person may not be the progenitor of the "succession—he may be, as in this case, his uncle"; and Lord Selborne said (27): "Devolution by law takes place whenever the "title is such that an heir takes under it by descent from an " 'ancestor', according to the rules of law applicable to the "descent of heritable estates; and in all cases of descent the estate "of the successor is immediately 'derived' from the 'ancestor' "from whom the estate descends. The word 'ancestor' does not "mean, either etymologically or technically, a lineal ancestor "only; in illustration of which proposition, I may refer to a "passage in Comyns' Digest as to the English writ of 'Mort " 'd'Ancestor'; which (it is said) 'does not lie upon the death of " 'any ancestor, except a father, mother, brother, sister, uncle, " 'aunt, nephew, or niece; for, upon the death of another ancestor, " 'an aiel, besaiel, or cosinage, lies' ". That decision was put forward as being powerful authority, to which I am bound to pay great respect, to the effect that the word "ancestor", as used in that statute, has this extended meaning in relation to the question of succession to property, *i.e.*, something which goes beyond any question of mere lineal descent. Clearly, if "ancestor" is capable of that extended meaning in relation to the Act of 1926,

(25) 3 App. Cas. 505.

(26) *Ibid.* 518.(27) *Ibid.*, 520.

this petitioner would be justified in saying that his two uncles were ancestors. Equally clearly he cannot say so if the expression "ancestor" connotes merely a lineal progenitor.

The reference to the ancient writ of mort d'ancestor made by Lord Selborne in his speech in the House of Lords has prompted a good deal of inquiry in this case as to the usage of the writ of mort d'ancestor in mediæval England. I do not think that it is necessary for me to discuss exhaustively the authorities that were presented to me in regard to the early history of that writ. It is sufficient to say that it was a writ available for the relief of a dispossessed heir, and that it was equally available whether he was heir to his father, or to his uncle, or to some other more distant relation. In other words, it covered something other than mere lineal descent. The inquiry into the history of the writ of mort d'ancestor, however, has not altogether been wasted, because it has thrown a light upon the history of the word "ancestor" itself. Etymologically, as was pointed out, and it has been accepted by both sides, the word means "antecessor", one who goes before, and in this wider sense it has been replaced in modern times by the word "predecessor".

I am tempted to take the view, from the etymological authorities to which I was referred, that the word was imported into this country as part of the Norman-French which the Norman conquerors brought with them, and I can well believe that in the early days of its use its primary meaning was to connote the idea of succession, the "ancestor" being the person prior in succession to the "heir". That is the meaning, I understand, which is attributable to the word in connexion with the writ of mort d'ancestor. It is, of course, a technical meaning, and it is clear that for some purposes that technical meaning survived, for otherwise the House of Lords could not have reached its decision when dealing with the question of succession duty in the case to which I have referred. But it is equally clear that at some time in English history another, and new, meaning of the word "ancestor" grew up, namely, as being the equivalent of forefather or lineal ascendant, and it is in that sense that it is in common use in ordinary language in modern times.

It is interesting to note, as a matter of history, that the ousting of "forefather" in favour of "ancestor" did not take place at any rate before the seventeenth century, for in the Authorized Version we still find that the old English word "forefather" is regularly used; but in modern times we talk less of our forefathers and rather more of our ancestors, and there is no doubt that to a large extent "ancestor", in its modern usage, has now replaced the older English word. On reference to modern English dictionaries it appears quite clearly that the primary meaning of the word is now "progenitor": that is to say, it connotes lineal

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descent. Murray's Oxford English dictionary apparently fails to notice altogether the older and rather more technical meaning of the word, which I have endeavoured to describe, and which appears in *Zetland (Earl) v. Lord Advocate* (28).

In those circumstances the question raised by this case is whether, in using the word "ancestor", the draftsman of the Act of 1926 intended to use the word in what I may call its technical sense, or whether he intended to use it in the sense of "forefather" or "lineal progenitor", as I venture to think it would ordinarily and commonly be understood in modern speech.

It is contended on behalf of the Attorney-General that it is of little use in these days, having regard to the modern meaning of the word, to refer to the archaic meaning of the word as it was used in connexion with the writ of *mort d'ancestor*. Counsel for the Attorney-General further sought to distinguish the decision of the House of Lords in *Zetland (Earl) v. Lord Advocate* (29) on the ground that that was a decision under a special Act, specifically concerned with succession duty in relation to succession to property. The draftsman of the Act of 1853 had to deal with the old historic rules with regard to succession, and it was pointed out that in those circumstances he might well have had to use words in their ancient, historic and perhaps technical sense.

It is said on behalf of the Attorney-General that the Legitimacy Act, 1926, is in an entirely different category: it is an act which, in effect, is to be read as one with that part of the Supreme Court of Judicature (Consolidation) Act, 1925, which concerns matrimonial affairs, although it is not specifically so described; it is an Act of a general character, intended to govern the relations of ordinary members of the public in their ordinary lives; and in such circumstances one would expect that *prima facie* words would not be used in their technical or ancient sense, but rather in their modern and popular sense. Mr. Simon, as well as Mr. Salt, relied on *Gunner v. Gunner and Stirling* (30). It was, he said, an excellent illustration of the way in which, in relation to a kindred matter, the court had construed a word such as "settlement" in its popular rather than in its technical sense.

Mr. Simon, like Mr. Salt, confessed himself unable to find any direct authority on the construction of the word "ancestor" in relation to this particular Act; but he referred to an American decision in *Valentine v. Wetherill* (31). Although I cannot rely on this American decision as an authority (and it was not suggested by Mr. Simon that it was in any way binding on me), it was a decision in relation to succession, and it does show that there are two views as to what is meant by the word "ancestor" in relation

(28) 3 App. Cas. 505.
(29) 3 App. Cas. 505.

(30) [1949] P. 77.
(31) 31 Barbour N. Y. 655.

to that question. The president of the court, delivering the judgment, said, in relation to the use of the word "ancestor" in the American statute to which he was referring (32): "The term "'ancestor' is used in its proper sense in the statute, and "designates the immediate not the remote source of the intestate's title. It is not equivalent to the expression 'the parent "or other kindred of the intestate', as used in the statutes "of Rhode Island. 'Ancestors', derived from antecessores, "designates the ascendants of the intestate in the right line, as "father and mother, grandfather and grandmother, and does not "include collateral relatives as brothers and sisters". That is some authority, although not one binding on me, for the construction of the word "ancestor" in what I think anyone would regard as its normal and popular use.

It appears to me, faced with this difficult problem, that what I have to remember is that it is for the petitioner to bring himself within the statute on which he relies. As I have stated, this court has jurisdiction only in so far as jurisdiction has been expressly conferred by statute; and it is for the petitioner who claims relief in pursuance of that statute to satisfy me that he brings himself within it. I accept the argument presented on behalf of the Attorney-General that prima facie words are to be construed in a statute such as this in accordance with their ordinary and natural meaning; and, having regard to the English dictionaries to which I have been referred, I feel bound, at any rate at this date, to accept that "ancestor" in its ordinary and natural meaning connotes a progenitor or one in direct lineal line of ascent. In view of the wide usage of the word in that sense in modern times in popular speech, I should have expected the draftsman in 1926 to have inserted a definition in the "definition "clause" of the statute if he desired to use the word in any other sense. This statute does in fact include a definition clause, but it makes no mention of the word "ancestor", and I must infer from that that no unusual or artificial interpretation of the word "ancestor" was intended.

What I have already said with regard to the prima facie meaning of the word "ancestor", namely, that it was intended to use it in its natural and ordinary sense of lineal progenitor is in my judgment supported by a review of the provisions of the Act as a whole. If the Act is studied as a whole it becomes apparent that the legitimation of any one person under it might affect numbers of other persons who might claim through him. Equally, and conversely, a number of other persons may be affected by the legitimation of a person through whom they claim; in other words the draftsman of the Act necessarily had to look

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both upwards and downwards in framing the provisions consequential upon the legitimation of this new class of persons. In relation to the former class, that is to say, persons who claim through somebody who is to be legitimated under the statute, its scope is clearly confined to a well-defined class, namely, "spouse, "children, or remoter issue". That phrase, not always quite in the same words, but substantially, is used again and again in the Act: see s. 1, sub-s. 3, s. 3, sub-s. 1, ss. 5, 8, sub-s. 2. The expression "parent or remoter ancestor" occurs only once, namely, in s. 2, which I have to construe. It is perfectly true, as pointed out by Mr. Salt, that most of the Act is concerned with changes in substantive law, and that s. 2, on the other hand, is purely procedural: it provides the remedy for persons affected by the Act. That, to my mind, is no reason against drawing the inference, which as a matter of construction I am tempted to draw, that those expressions, "parent or any remoter ancestor", and "children or remoter issue" must be regarded as correlative with each other.

So far as "issue" is concerned, there can, I think, be no possible doubt as to what is meant by that word: clearly it is confined to children and lineal descendants. It is obvious that that is the only meaning which the word "issue" is capable of bearing, and if that is right it is a very strong argument in support of the contention that "ancestor" is being used in the opposite and correlative sense, namely, that of lineal progenitor as opposed to lineal descendant. Furthermore, there is this much extra assistance to be derived from a study of the Act as a whole. As Mr. Simon pointed out, when the draftsman did desire to go outside the range of lineal progenitors or lineal descendants he changed in s. 7 of the Act the word which he was using and used instead the words "any relative". That is another argument in favour of restricting the meaning of "ancestor", as used in s. 2, to the narrower meaning which it has in popular speech to-day, rather than giving it the extended meaning contended for by Mr. Salt, a meaning which one would have thought would have been better expressed by the word "relative", the word actually used by the draftsman in s. 7. The provisions of s. 188 of the Supreme Court of Judicature (Consolidation) Act, 1925, further confirm this construction of the Act of 1926. Section 2 must be read closely with s. 188, because it is a section which extends the relief or remedy already prescribed by the earlier section to the enlarged class of persons brought into existence by s. 1 of the Act of 1926. It is therefore by no means irrelevant to consider s. 188, which reproduces in this respect the provisions of the Legitimacy Act of 1858. It is careful to confine the petitioner seeking relief to a claim that he "is the legitimate child of his "parents, and the marriage of his father and mother, or of his

“grandfather and grandmother, was a valid marriage, or that his own marriage was a valid marriage”. In other words, s. 188 of the Act of 1925 was concerned only with a limited class of persons, that is to say, lineal progenitors or descendants. There is nothing that I can see in the wording of s. 2 of the Act of 1926 to show that Parliament had any intention of going outside lineal progenitors or descendants in relation to the new class of persons entitled to claim relief.

That is in my opinion sufficient to dispose of this case. There are other points advanced by Mr. Simon as reasons for adopting this construction of the Act. I do not think it necessary to discuss in detail the other arguments which he advanced, and which I have very carefully considered. I have approached this matter primarily as being one of construction, bearing in mind what I conceive to be the true canons of construction and doing the best I can in view of the paucity of authority.

I have also particularly considered the onus which is upon the petitioner to bring himself within the jurisdiction conferred by the statute. I have come to the conclusion that the petitioner has not made out his case—that is to say, he has not brought himself within the range of persons who can petition under s. 2; and that he is therefore not entitled to have the declaration made in his favour.

Solicitors: *Rowe and Maw; Treasury Solicitor.*

J. B. G.

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Husband and wife—Divorce—Procedure—Appeal—“Where no error of the court is alleged”—Construction—Application for rehearing of cause—Jurisdiction of Divisional Court—Matrimonial Causes Rules, 1947 (St. R. & O., 1947, No. 523L/9), r. 36 (1).

By r. 36 (1) of the Matrimonial Causes Rules, 1947, “An application for rehearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division . . .”.

In view of the statutory history relating to appeals in matrimonial causes and of the circumstances in which r. 36 came into existence, that rule was intended, or should be treated as having been intended, to give or preserve to a Divisional Court, because of the peculiar public concern in matrimonial matters, the right to order a new trial or a rehearing in cases in which the parties themselves would not in the ordinary course be entitled to go to the Court of Appeal. Accordingly, it was intended by the use of the

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words "where no error of the court at the hearing is alleged", to exclude all cases in which an aggrieved party might seek, on application according to the ordinary general procedure of the Court of Appeal, to challenge as erroneous the conclusion of the judge at the hearing in the court below.

In relation to trespassing on the exclusive jurisdiction of the Court of Appeal, the defended cause stands in a different light from the undefended cause, for in the latter the respondent has in the ordinary course no right of appeal, whereas in the former he has such a right, and in certain circumstances a further right to call fresh evidence. Where the case is defended, and the trial judge on the vital issue prefers one set of witnesses to the other set, an error of the court at the hearing is and must be alleged if it is sought to call further evidence in order to try to persuade the court on a rehearing that the judge's preference was erroneous.

Where, therefore, a wife charged with adultery included in her evidence by way of rebuttal the statement that a neighbour and friend, a married woman, had been in the matrimonial home at the crucial times, the neighbour herself not being called, the husband's petition was dismissed, but his solicitors traced the neighbour and obtained from her a statement that she had been nowhere near the matrimonial home at any relevant time, but in a different locality,

Held, that the Divisional Court had no jurisdiction to entertain an application by the husband under r. 36 (1) for a rehearing, for its doing so would trespass on the jurisdiction of the Court of Appeal, because the husband could have appealed to it on the ground that the trial judge's decision was against the weight of evidence, and could also have applied for leave to call before the Court of Appeal fresh evidence based on the neighbour's statement; and also because the husband's complaint necessarily alleged error on the part of the court in wrongly estimating the evidence.

Though the distinction was a fine one, there was a real difference between the case where the judge, having conflicting evidence before him, had made an incorrect selection of evidence or had (erroneously) failed to accept evidence or to draw the right inference from it, and the case where he had drawn an inference from undisputed evidence which was justifiable on the materials before the court, although subsequently proved to be incorrect. That distinction corresponded with the presence or absence of jurisdiction in the Court of Appeal: in the former case the unsuccessful party alleged, as in the latter he did not, error in the court; and in the former case the Divisional Court would not have had jurisdiction under r. 36 because the Court of Appeal had it and because error, in a limited sense at least, must be alleged.

Petty v. Petty [1943] P. 101 and *Peek v. Peek* [1948] P. 46; (C. A.) 66 T. L. R. (Pt. II) 503 considered.

APPEAL from the Divisional Court.

The appellant husband petitioned for divorce on the ground of his wife's, the respondent's, adultery.

In his petition he alleged adultery in the matrimonial home

from November 10 to November 19, 1947. The wife and co-respondent denied adultery. The husband's evidence consisted partly of evidence of the presence of a man at night or in the early morning in the matrimonial home. The husband's father stated that he called one evening in September, 1947, at the matrimonial home when the husband was away and after some delay he was admitted by the wife. When in the house he saw some stubs of cigarettes, one still smoking. The wife in her evidence accounted for the cigarettes by saying that they had been smoked by Mrs. Jones, a neighbour, who had just left. She said that in the evenings when the neighbours had seen a man arriving or leaving the house, a workman had been working in the house and that when the husband was in hospital she had gone out with her father in the evenings leaving Mrs. Jones to mind the children. Mrs. Jones was not called by the wife, who stated that she had moved to London.

The Commissioner, Judge Fraser Harrison, dismissed the husband's petition as he was satisfied that the cigarette ends had been left by Mrs. Jones and that the neighbours were wrong when they said that they saw the co-respondent entering or leaving the house when the husband was away. He granted the wife a divorce on the ground of the husband's cruelty. Subsequently the husband's advisers traced Mrs. Jones in London, who said that she left the place of the matrimonial home in May, 1947, and that she was not there in either September or November, 1947. The husband applied under r. 36 of the Matrimonial Causes Rules, 1947 (1), to the Divisional Court for a rehearing.

The Divisional Court dismissed the application on the ground that "an error of the court at the hearing" was alleged and that they had not jurisdiction under the rule to order a new trial (2). The husband appealed.

Crispin and Stuckey for the husband. It is submitted that no error is alleged where the judge came to the right conclusion on the evidence before him: *Manners v. Manners and Fortescue* (3). It was held in *Winter v. Winter* (4) and *Peek v. Peek* (5) that the Divisional Court had jurisdiction. The latter authority is difficult to reconcile with *Petty v. Petty* (6). The court is asked to say that *Peek v. Peek* (5) correctly explains

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(1) By the Matrimonial Causes Rules, 1947, r. 36 (1): "An application for rehearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division . . . (2) Any other application for rehearing

"shall be made by way of appeal to the Court of Appeal".

(2) [1949] W. N. 402.

(3) [1936] P. 117.

(4) [1942] P. 151.

(5) [1948] P. 46; (C. A.) 66

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(6) [1943] P. 101.

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the effect of r. 36 and that the tests suggested in *Petty v. Petty* (6) are wrong. Here no error is alleged. All that the husband seeks to do is to bring before the court evidence which was not available at the hearing.

R. H. Forrest for the wife. The rule gives jurisdiction to the Divisional Court if no error of the court "at the hearing" is alleged. If the parties to the issue are properly before the court at the hearing, then any error is an error of the court. If the issues or parties are not brought fairly and squarely before the court, the court cannot be said to have made an error. It is submitted that here there was an error of the court. The issue before the court was whether the wife had committed adultery. Each part of the evidence cannot be treated as a separate issue. There would be "no error" of the court if the grounds of appeal were something done before the hearing or on the ground that one of the parties was not represented. In *Peek v. Peek* (7), no evidence was before the court on the material matters. Here evidence was before the court. If in this case there was concealment on a vital matter, so there was in *Petty v. Petty* (6) and *Tucker v. Tucker* (8). The error here was in believing the wrong set of witnesses.

G. H. Crispin in reply.

Cur. adv. vult.

June 26. *EVERSHED M.R.*, reading the judgment of the court, stated the facts, referred to the evidence, and continued:— Rule 36 of the Matrimonial Causes Rules, 1947, was made by Lord Jowitt L.C. under s. 1 of the Administration of Justice (Emergency Provisions) Act, 1939, and s. 99 of the Supreme Court of Judicature (Consolidation) Act, 1925. It follows the wording of a similar rule first made in 1924 to which we refer later.

It is not necessary to consider the evidence called on behalf of the husband or on behalf of the wife with regard to their mutual charges of cruelty. The crucial point on which the application for a rehearing turned related to the husband's charges of adultery against the wife.

Two questions were raised at the hearing of this appeal: one, whether this case came within r. 36; the second, whether, assuming that it was such a case, the facts alleged in the copies of statements attached to the husband's affidavit were such as would justify a rehearing. In view of our decision on the first point, we consider it unnecessary to express any opinion with regard to the second, which involves considerations peculiarly

(6) [1943] P. 101.

(8) [1949] P. 105.

(7) [1948] P. 46; (C. A.) 66

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within the discretion of the court in which the jurisdiction is vested.

We accordingly turn to the important question raised in the Divisional Court, and before us, as to the limit of the jurisdiction conferred by r. 36. The importance of the rule, apart from its obvious usefulness in preventing a miscarriage of justice in a matrimonial cause, is that the matters over which it confers jurisdiction are, or may be, withdrawn from the jurisdiction of the Court of Appeal. Thus, in *Smith v. Smith* (9) an application was made to the Court of Appeal to order a rehearing of a divorce cause heard by Gorell Barnes J. without a jury. The application was regarded as covered by r. 62 of the Rules in Divorce and Matrimonial Causes, 1865, as amended in 1885, which was in the following terms: "An application for a new trial of the issues of "fact tried by a jury or for the rehearing of a cause, shall hereafter be made to a Divisional Court of the Probate, Divorce and Admiralty Division".

The Court of Appeal held that it had no jurisdiction to make the order. Lindley L.J. said (10): "I think it clear, on looking at the Act and the rule, that this application ought to be made to a Divisional Court of the Probate, Divorce and Admiralty Division, and that we have no jurisdiction to entertain it". The Act referred to by the Lord Justice was presumably the Supreme Court of Judicature Act, 1890, s. 1 of which enacted: "From and after the commencement of this Act every motion for a new trial, or to set aside a verdict, finding, or judgment, in any cause or matter in the High Court in which there has been a trial thereof, or of any issue therein, with a jury shall be heard and determined by the Court of Appeal, and not by a Divisional Court of the High Court".

Smith v. Smith (9) had been tried by a judge alone, and the application to the Court of Appeal was for a rehearing. Lindley L.J. appears, therefore, to have treated it as within the terms of r. 62 of the Divorce and Matrimonial Causes Rules, 1865, and not taken out of that rule by s. 1 of the Act of 1890. In 1892, in order apparently to bring the procedure in non-jury cases into line with cases where there had been trials with a jury, the Rules Committee constituted under s. 19 of the Judicature Act of 1881, had made R.S.C. Ord. 39, r. 1, which reads as follows: "Every motion for a new trial or to set aside a verdict, finding, or judgment shall be made where there has been a trial without a jury by appeal to the Court of Appeal". That rule does not appear to have been referred to at the hearing of *Smith v. Smith* (9) in the Court of Appeal, or, if referred

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(9) [1897] P. 293.

(10) Ibid. 294.

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The question whether an application for a rehearing of a divorce cause tried by a judge without a jury must be made to a Divisional Court of the Probate, Divorce and Admiralty Division, or to the Court of Appeal, was again raised in the Divisional Court (Lord Sterndale P. and Hill J.) in *Garnett v. Garnett and Calderon* (11). Counsel for the applicant husband in the cause, which was contested and tried by Horridge J. without a jury, asked that the judgment should be reversed, mainly on the ground that the judge had misdirected himself as to the evidence, and also on the ground that vital new evidence was available. The court allowed the application on the ground that the judge had misdirected himself as regards the evidence. The President also said that the sooner the practice as to such appeals was altered the better. Counsel then referred to the decision in *Smith v. Smith* (12) and suggested that the President had power to make a fresh rule which would bring the practice as regards appeals into line with appeals from other divisions, and the President said that he might consider it when he had finished Prize work. Again, R.S.C. Ord. 39, r. 1, was not referred to. Five months later Lord Sterndale was made Master of the Rolls, and no fresh rule was made until 1924.

Rule 46 of the Matrimonial Causes Rules, 1924, is in substantially the same terms as r. 36 of the present rules. It introduced the words "where no error of the court at the hearing "is alleged". It is clear from the report in *Garnett v. Garnett and Calderon* (13) that the Divisional Court made the order for a rehearing in that case because of an alleged misdirection by the trial judge, and one may fairly assume that the new rule was made in order to exclude such cases from the jurisdiction of the Divisional Court and so that (as in cases from other divisions of the High Court) the Court of Appeal should have exclusive jurisdiction over them by way of appeal, to order a rehearing, to reverse the decision, or to make such other order as might appear to be just. In other words, in so far as the general rule contained in Ord. 39, r. 1, had been treated as inapplicable or in conflict with r. 62 of the Probate and Divorce Rules, 1865, the general rule was intended to apply thenceforth in all cases, save for the limited exception provided by the new r. 46.

The scope of r. 46 was considered by the Divisional Court (apparently for the first time) in *Manners v. Manners and Fortescue* (14). In that case the respondent wife applied to the Divisional Court that the decree against her should be set aside

(11) (1919) 35 T. L. R. 521.

(12) [1897] P. 293.

(13) 35 T. L. R. 521.

(14) [1936] P. 117.

and the case reheard, on the ground that she had not been served with the petition. Sir Boyd Merriman P., in the course of his judgment, said that there was no precedent to guide the court as to what was meant by the words "where no error of the court at the hearing is alleged". He said that he thought that it would be most inadvisable to attempt to lay down any exhaustive definition of what those words meant, but that it was quite plain that the wife was entitled to be heard, and there must be a rehearing of the case. Langton J., in the course of his judgment, said that in the nature of things the cases which could fall within the rule must be comparatively few, but that the rule must contemplate something more than the bare cases under R.S.C. Ord. 36, r. 3, in which judgment has been given by default. He continued (15): "It may be that the proper way to regard this case is to treat it as a suit which is not properly constituted in that there has been a failure in an indispensable step of the procedure. One then turns to inquire whether it is the fault of anyone concerned in the administration of justice here that that indispensable step was not complied with. Clearly it could not be the fault of the court, for everyone must be agreed, upon reading the evidence, that the court had ample evidence upon which to act and indeed, as both counsel agree, could not have acted in any other way; nor could any inquiries on the part of the court have ensured that that indispensable step, the service of the petition, was complied with".

Langton J. also considered the question whether it was proper that the judge who heard the case should also sit as a member of the Divisional Court on the application for a rehearing, and in that connexion he said (16): "I think it is both right and desirable that he should, if possible, be a member of the court which has to consider the question of rehearing. It is to be observed that in no sense is any action of his impugned; ex concessis no error by the nature of things can be imputed to him, and his recollection, slight perhaps, but nevertheless probably refreshed as the matter goes on—is of inestimable assistance in dealing with this very limited class of case".

If the view of Langton J. as there expressed is correct, it seems to us that the scope of the rule could hardly include a contested case in which the judge, on an issue of vital importance, has elected to believe one witness and has rejected the evidence of another, and the application for a rehearing is based on the hypothesis that the judge was in error in so doing, and will, when he hears the fresh evidence, realize that he was in error. We here use the word "error" as meaning or including the making

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(15) [1936] P. 117, 127-8.

(16) Ibid. 128.

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The next reported case on the application of r. 36 is *Winter v. Winter* (17). In that case the husband asked for a rehearing of the wife's petition on the ground that the decree which she had obtained on the ground of his alleged desertion was against the justice of the case, in that it was untrue that he had ever deserted her, and that he now wished to put the real facts before the court. The wife's petition had been duly served on the husband, who had deliberately decided to do nothing to oppose it and had not entered an appearance, so that the petition was undefended and the wife obtained her decree. The Divisional Court ordered a rehearing, although, as Langton J. said in the course of his judgment, the application, so far as the husband personally was concerned, had no vestige of merit. The order for rehearing was made on the specific ground that in matrimonial matters there was always something more to be considered than the mere individual merits of the parties, and it was the duty of the court to consider the interests of the State, as well as the private interests in such cases. Langton J. also pointed out that there was no possibility of an appeal to the Court of Appeal by the husband. Inasmuch as he had not entered an appearance, it seems doubtful whether he would have had any locus standi on appeal.

Up to this point the Divisional Court had not considered any application for a rehearing of a cause in which there had been a conflict of evidence on vital matters, and in which the loser was seeking to obtain a rehearing on the ground that fresh evidence was available which would put an entirely different complexion on the case. In such a case, if the Divisional Court has exclusive jurisdiction to order a rehearing, such power obviously trenches on the general jurisdiction of the Court of Appeal to make a similar order.

The question whether the Divisional Court had jurisdiction to order a rehearing in a case in which there would be an obvious right of appeal was first raised in *Petty v. Petty* (18), a case heard by Lord Merriman P. and Henn Collins J. The application was by the wife for the rehearing of a contested case, in which the wife asked for a divorce on the ground of her husband's cruelty and desertion, while the husband denied these charges and charged the wife with desertion. Both parties gave evidence and called witnesses. The judge dismissed the wife's prayer and gave the husband a decree because he preferred the husband's evidence to that of the wife. The basis of the wife's application for a rehearing was that since the hearing she had obtained

(17) [1942] P. 151.

(18) [1943] P. 101.

statements from several witnesses, whose evidence would persuade the court that the truth lay with the wife and not with the husband. Also it was said that the preparation of the wife's case had been interfered with by enemy action. Lord Merriman P., in the course of his judgment, said (19): "We feel that the peculiar jurisdiction vested in this court by r. 36, (1) should only be exercised in cases in which it is plain that this court is intended to have the jurisdiction to the exclusion of the Court of Appeal."

After reviewing the history of the jurisdiction now embodied in the rule, Lord Merriman P. said that, in his view, it was impossible to attach to the word "error" in the rule any interpretation or limitation based solely on any part of the earlier history of the court. "It is much more likely," he continued (20), "that the words were deliberately chosen as being apt to impose a limitation on our special jurisdiction to order a rehearing notwithstanding the vesting in the Court of Appeal of the general right to deal with such applications from this Division."

Lord Merriman P., when presiding in the Court of Appeal in the recent case of *Everitt v. Everitt* (21), again emphasized this limitation of the jurisdiction of the Divisional Court under r. 36. He said: "In dealing with cases under r. 36 . . . the Divisional Court has always been careful to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal: *Petty v. Petty* (22), *Peek v. Peek* (23); although, if the Divisional Court is satisfied that a case comes within the rule it is bound to deal with it, as I pointed out in *Peek v. Peek* (24), because no other court can do so. See also *Smith v. Smith* (25), decided in the Court of Appeal under r. 62 of the Matrimonial Causes Rules, 1865, as amended in 1885".

In *Petty v. Petty* (22), Lord Merriman P., after referring to *Manners v. Manners and Fortescue* (26) and *Winter v. Winter* (27) said (28): "Those two cases, which, so far as I know, are the only two cases in which a decision of this court on this point has been reported are, as I think, clearly on the right side of the line. Equally, however, it seems to me impossible to assert that a case in which a judge, having seen both spouses and their respective teams of witnesses, has deliberately attached credibility to one side and not to the other, and in which this court is asked to say that the production of further evidence

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(19) [1943] P. 101, 102.

(20) Ibid. 103.

(21) [1948] 65 T. L. R. 121, 123.

(22) [1943] P. 101.

(23) [1948] P. 46.

(24) Ibid. 48.

(25) [1897] P. 293.

(26) [1936] P. 117.

(27) [1942] P. 151.

(28) [1943] P. 101, 104.

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“ will induce some other tribunal to say that the judge believed
 “ the wrong set of witnesses, is on the same side of the line, so
 “ that it can be asserted of such a case that ‘ no error of the
 “ ‘ court at the hearing is alleged ’. In saying this I do not
 “ ignore the point that logically in a case in which process has
 “ not been served or where one party has deliberately abstained
 “ from attendance, it is not possible to deny that it is being
 “ said that the judge has believed a witness wrongly . . . it may
 “ be deliberate perjury, but, although it is true that what is being
 “ asked is that it shall be held that the judge believed a witness
 “ wrongly, and although at the rehearing, the court is to be
 “ invited to believe witnesses who will swear exactly the opposite,
 “ still, in those circumstances, unless there was something which
 “ made the story self-condemnatory, the judge had no option
 “ but to believe the witness. There was no contest. There was
 “ no possibility of testing the credibility of the witnesses believed,
 “ unless by what I might call some psychic test which would
 “ manifest itself through mere demeanour during the brief
 “ appearance of the witness in the witness box. Such a case as
 “ the present is, in my opinion, on the other side of any line
 “ which can be drawn, and is plainly a case which must be
 “ dealt with by the Court of Appeal ”.

Henn Collins J., in the course of his judgment, said (29):
 “ One thing, however, seems to me to be clear, and that is that,
 “ if it is alleged that, on the materials before it, the court has
 “ arrived at a wrong conclusion, that is an error of the court.
 “ What exactly is meant by ‘ the materials before the court ’ is
 “ another matter. In the present case the material before the
 “ court was the evidence of witnesses on one side and the other.
 “ . . . It is now said that he [the judge] believed the wrong set of
 “ witnesses, and that, if he had known some further facts which
 “ it is proposed to adduce, he would have discredited those whom
 “ he believed, and believed those whom he discredited. That
 “ must mean that he was unable to arrive at what is now alleged
 “ to be the truth on the materials before him, in other words,
 “ that he made an error. In those circumstances how can it be
 “ said that ‘ no error of the court is alleged ’ ? ”.

The next reported case on the problem of the meaning of r. 36 is *Peek v. Peek* (30). That case concerned a decree obtained in an undefended divorce petition, by a husband on the ground of his wife’s desertion. The parties had lived in Australia after their marriage, and in about 1922 the husband had left Australia and returned to England on account of his work. The husband’s case was that his wife in 1922 had refused to leave the marital

(29) [1943] P. 101, 105.

(30) [1948] P. 46; (C. A.) 66
T. L. R. (Pt. II) 508.

home in Australia, and had thereafter refused to come to live with him. He admitted having an adulterous association with another woman in 1924, in respect of which he asked for the discretion of the court to be exercised in his favour. The petition, which was issued in 1946, was served on the wife in Australia in January, 1947, and the wife then wrote to the Divorce Registry in London saying that she had been unable to instruct solicitors, and that her husband had deserted her. This letter was before the trial judge. She also applied for legal assistance as a poor person, but before this was granted the husband's petition was heard as an undefended suit and the trial judge granted him a decree nisi. The wife then applied to the Divisional Court for a rehearing, and in support of her application produced certain documents which made it highly probable that the husband had deserted the wife in 1922 and had committed adultery in that year, had told the wife about it, and had asked her to divorce him.

Having regard to the fact that the wife did not enter an appearance to the petition, the case was one in which she could not appeal in the ordinary course to the Court of Appeal, and therefore there was no question of trespassing on the exclusive jurisdiction of that court. The question which was much debated before the Divisional Court was whether the case was one in which "no error of the court at the hearing was alleged". Lord Merriman P. in the course of his judgment said (31): "To assert 'of this case that any judge had no option but to come to the conclusion he did is, and must be, nonsense. I say that for this reason, that the very request for the exercise of the discretion of the court itself implies, whether it is a defended or an undefended case, that the judge has an option; otherwise, the discretion is meaningless. Of course he had an option. . . . If ever there was a case, undefended though it be, and not merely because the discretion was asked for, but because there was, on the face of the case as it was presented to the judge, and avowedly and openly presented, the gravest possible doubt whether any court could hold that desertion had been proved, in which there was the plainest possible option to the judge to decide the case otherwise, it is this case'".

Lord Merriman P. then said that the real point was whether the allegation which was made against the decision was an allegation that the court went wrong on the materials before it; or was it an allegation that the court went wrong because evidence on a vital matter was concealed from the court? "To my mind," the President said (32), "it cannot make the slightest difference, logically, whether that question or those questions fall to be decided in an undefended or a defended

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(31) [1948] P. 46, 59.

(32) Ibid. 60.

C. A. " case. . . . I reject the argument that this matter depends
 1950 " solely on the question whether the case is defended or
 " undefended . . . this case is an illustration, not of a case in
 PRINCE " which the court went wrong on the materials before it, but
 v. " rather of a case in which it is alleged that the court went
 PRINCE. " wrong (if it did—that remains to be determined) because
 " evidence on a vital point was concealed from it . . . when one
 " analyses this case, the only thing which can be said to be
 " error on the learned judge's part is a failure to appreciate, in
 " the light of the documents which were not produced before him,
 " the full possible implications of those which were produced
 " before him ".

Wallington J., in his judgment, said that in his opinion one of the objects of r. 36 is to enable the Divisional Court to secure as far as possible that there should be a new trial of the real issues between the parties, before permitting an appeal to the Court of Appeal, and that he entirely agreed that it mattered not whether the question arose in a defended or an undefended case. The Divisional Court therefore granted the application for a rehearing. The husband appealed from that decision to the Court of Appeal, but the appeal was dismissed (33). The basis of the decision in the Court of Appeal was that, on the material before the judge, it was impossible to say that there was any error on his part which was alleged, because on the husband's evidence the judge was well entitled to come to the decision to which he came. Tucker L.J. and Somervell L.J., also said that they wished to keep open the question whether it may be immaterial to consider what happened at the trial, provided that the party seeking a rehearing is basing his whole case on something quite irrespective of the course which the case in fact took on the material before the court.

Before passing from *Peek v. Peek* (34), we would point out:—
 (A) So far as the question of trespassing on the exclusive jurisdiction of the Court of Appeal is concerned, the defended case stands in a different light from the undefended case. If undefended, the respondent has in the ordinary course no right of appeal; if defended, the respondent has a right of appeal, and a further right in certain circumstances to call fresh evidence. In such a case the Court of Appeal may either hear the fresh evidence and dismiss the suit, or order a rehearing, or dismiss the appeal. (B) Where the case is defended, and the trial judge on the vital issues prefers one set of witnesses to the other set, it appears to us that an error in the court at the hearing is and must be alleged if it is sought to call further evidence in order

(33) 66 T. L. R. (Pt. II) 503.

(34) [1948] P. 46; (C. A.) 66
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to try to persuade the court on a rehearing that the judge's preference was erroneous. We think that there is a difference, albeit a fine one, between an incorrect selection of conflicting testimony and an erroneous inference drawn therefrom, and an inference drawn from undisputed evidence which was justifiable on the materials before the court, although subsequently proved to be incorrect.

The question may be asked what remedy the respondent spouse has in an undefended case, if he is precluded from appealing to the Court of Appeal because he has not appeared in the suit, and is precluded from asking the Divisional Court for a rehearing because he cannot say that the court has not made an error at the hearing. It would seem that his remedies would be to obtain the intervention of the King's Proctor or of a bona fide member of the public under s. 183, sub-s. 2, of the Supreme Court of Judicature (Consolidation) Act 1925. That sub-section states: "After the pronouncing of the decree nisi and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit". In *Howarth v. Howarth* (35), Lindley L.J., when considering the application of this section said: "So far as I know 'any person' means anybody except the respondent and somebody who is the respondent in disguise, his agent or his puppet".

But we do not think that, in considering whether r. 36 applies, the test whether the case is defended or undefended is conclusive. For instance, a petitioner in an undefended case, whose petition has been dismissed, can appeal to the Court of Appeal and apply for leave to call fresh evidence which was not available at the trial. The judge might have said that on the evidence he was not satisfied that the adultery complained of had been established. But the fresh evidence, if admitted, might establish adultery conclusively. Though the distinction is a fine one, there is, we think, a real difference between such a case as that supposed, where the judge, having evidence before him, has (erroneously) failed to accept it or to draw the right inference from it, and the case also earlier mentioned where the judge, because the evidence has been unchallenged and could not be tested, had in effect no option but to accept it. And the distinction corresponds with the presence or absence of jurisdiction in the Court of

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Appeal. In the former case the unsuccessful party alleges (as in the latter he does not) error in the court. In the former case, we think, the Divisional Court would not have jurisdiction under r. 36, because the Court of Appeal has it, and because error, in a limited sense at least, must be alleged.

We have set out the relevant decisions on the meaning of this rule before considering the precise point raised in the Divisional Court in the present case. The point is raised in the judgment of Lord Merriman P. where he said that there is no real distinction between the present case and *Petty v. Petty* (36), but that the observations made in the Court of Appeal in *Peek v. Peek* (37), raise this point which has not yet been decided—namely, if the principle is accepted that deception of the trial judge by suppression of material facts is the antithesis of his going wrong on the material before him, it makes no difference, provided that the course of the trial warrants it, whether the suppression of the evidence or other malfeasance alleged as ground for a rehearing is committed by the petitioner in presenting the case, or by the respondent in rebutting it.

The question is whether the decision of the Divisional Court in *Petty v. Petty* (38) imposed too strict a limitation on the jurisdiction of the court, and whether it can be extended without trespassing beyond the bounds which, to use the words of Lord Merriman P. in his judgment: “must necessarily be imposed at “some point or another to avoid an overlap of jurisdiction “between this court and the Court of Appeal”.

In this appeal we think that the application for a rehearing does trespass on the jurisdiction of the Court of Appeal, because the husband could have appealed from the decision of the judge on the ground that his decision was against the weight of evidence, and could also have applied for leave to call before the Court of Appeal the evidence which is indicated in his affidavit. And we think that it follows also from what we have just said that error of the court (that is, in wrongly estimating the evidence) is necessarily alleged.

In our opinion, therefore, the decision of the Divisional Court was right, and the appeal should be dismissed.

After examination of the history since 1857 of the statutes relating to appeals in matrimonial causes and the rules made under them, it seems to us from the circumstances in which r. 46 of the Matrimonial Causes Rules, 1924 (which was the forerunner of the present r. 36) came into existence (namely, the apparent conflict between the earlier matrimonial causes rules and the general jurisdiction of the Court of Appeal, under the

(36) [1943] P. 101, 102.

(37) [1948] P. 46; (C. A.) 66

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(38) [1943] P. 101.

Supreme Court of Judicature Act, 1890, and the rules made under it) that r. 36 was intended, or ought to be treated as having been intended, to give or preserve to a Divisional Court (because of the peculiar public concern in matrimonial matters) the right to order a new trial or a rehearing in cases in which the parties themselves would not in the ordinary course be entitled to go to the Court of Appeal. If this view is right, then it appears to us that by the phrase "no error of the court at the hearing is alleged" it was intended to exclude all cases in which an aggrieved party might seek, upon application according to the ordinary general procedure of the Court of Appeal, to challenge as erroneous the conclusion of the judge at the trial or hearing in the court below.

We add that, having regard to the difficulties of interpretation which have now emerged from the rule, and because we think that the jurisdiction of the Divisional Court is, in the class of cases to which (as we think) it was intended to be confined, extremely valuable, consideration should be given to the drafting of a new rule in terms that would express more precisely the scope and limitation which the jurisdiction is intended to have.

Appeal dismissed.

Solicitors: *Chamberlain & Co. for Stanley Williams & Elsby, Liverpool; Jaques & Co. for T. R. Jones & Co., Liverpool.*

B. A. B.

DOUGLAS v. DOUGLAS.

Husband and wife—Divorce—Adultery—Connivance—Volenti non fit injuria—Consent to inception of adultery—Reasonable belief in evidence of adulterous association—Standard of proof—Petitioner's creation of opportunity for adultery.

Connivance at adultery must be strictly proved, and the presumption of law has always been, and remains, against connivance. Generally speaking, the material event is the inception of the adultery and not its repetition, and the material question is: did the party connive at the inception of the adultery or at its continuance in such a way as to show that he must have connived at it from the first? If the balance of probabilities leads the innocent party to the conclusion that adultery began at about a certain date, that date ought to be taken in considering the issue of connivance, although adultery at that time might not be sufficiently proved for the purposes of granting a decree. The issue of connivance depends upon the state of mind of the alleged conniver at the relevant time. When an innocent husband quite reasonably

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believes that his wife has already begun an adulterous intrigue, he is entitled not only to watch her or to have her watched, but to create an opportunity for the repetition of the adultery in order that it may be discovered and proved, there being, on his part, no corrupt intention.

But, *per* Bucknill L.J. Primarily, the court should consider the conduct of the alleged conniver objectively, *i.e.*, should consider what its natural and probable result would be with regard to encouraging and promoting his spouse's adultery, rather than consider his intention, though his intention could not be said to be irrelevant to that issue.

A husband, who was the licence-holder at an hotel, where he worked mainly in the bar and his wife worked in the kitchen, in August, 1948, suspecting his wife of committing adultery with the co-respondent, adjusted the speaking apparatus from bar to kitchen, so that he could hear what was said in the kitchen, and also removed a bolt, so that he could see into the kitchen from the bar. His suspicions being confirmed, on reasonable grounds, by what he had overheard and seen in the kitchen, he instructed solicitors at the end of January, 1949, and, through them, inquiry agents, who suggested to him that he should find some excuse to absent himself from the hotel and let this be known. This he did on February 11, 1949, when one of the inquiry agents observed the pair having sexual intercourse. The Court of Appeal was satisfied that, when the husband fixed the apparatus for spying on his wife, he would have been gratified if, as a result of his actions, he had found that his suspicions were without foundation and that, when adultery was finally proved, he exclaimed: "my "world has gone to pieces". On the husband's petition on the ground of his wife's adultery, the divorce commissioner found that the husband was an honest witness and that the adultery was proved, but only on February 11, and not before. Considering himself bound by *Manning v. Manning* and *Fellows v. Fellows* [1950] 1 All E. R. 602, he said that he must reluctantly hold that the husband had been guilty of connivance, and he dismissed the petition. ??

On the husband's appeal,

Held, (1.) that, though it might have been impossible to establish proof of adultery as a matrimonial offence before February 11, 1949, on the issue of connivance, where the issue was as to the state of the husband's mind, the husband believed on reasonable grounds that the inception of the adultery was much earlier, *Somervell L.J.*, stating that, if it were necessary, he was prepared to hold, on a balance of probabilities, that an adulterous association existed at about Christmas, 1948; and (2.) that, on the evidence, the husband was not seeking to encourage and promote an adulterous intercourse, but seeking proof of what, from Christmas, 1948, he rightly believed to exist—adultery of his wife with the co-respondent; and that to obtain that proof he might even acquiesce in its continuance or create an opportunity for its manifestation without being guilty of connivance, there being no corrupt intention.

Observations by Bucknill L.J. on his judgment in *Manning v. Manning and Fellows v. Fellows* [1950] 1 All E. R. 602.

Manning v. Manning and Fellows v. Fellows (supra) distinguished.

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APPEAL from Judge Whitmee, sitting as a commissioner in divorce.

The facts were stated by SOMERVELL L.J. in his judgment substantially in the following terms:—The appellant married the respondent in June, 1936. At all material dates the husband petitioner was the licensee of the Queen's Head Hotel, Nayland, in which his wife and he himself worked, she in the kitchen and he mostly in the bar. They had a daughter aged eleven years. In 1944 the co-respondent, who was a married man, began taking his meals at the Queen's Head. He became a friend of both husband and wife, and used to help from time to time in odd jobs. No suspicion of any kind arose as to the relationship of the wife and the co-respondent for four years. In August, 1948, the husband noticed, he thought, a slight change in his wife's attitude. She seemed to side with the co-respondent against him. He spoke to her two or three times. She assured him that the co-respondent had no hold over her, and told him not to be silly. At the end of November or beginning of December, 1948, he heard his wife say to the co-respondent: "Don't be a bloody fool; do you want to break my home up". He spoke to his wife, and she again assured him that the co-respondent had no hold over her. He remained suspicious. He was, he said, determined to find out the truth. He adjusted the speaking apparatus from bar to kitchen so that he could hear what was said in the kitchen. He also removed a bolt, so that he could see into the kitchen.

Just before Christmas, 1948, the husband heard his wife and the co-respondent having high words. The latter said that she was only one of his wives. She said: "I am degraded, I have sunk as low as I can and you cannot deny it". Just after Christmas he heard his wife tell the co-respondent that she was late in her periods.

The husband continued to share a bed with his wife until February 12, 1949. About a week before Christmas, 1948, he took his wife to their doctor. She said that the doctor advised that there should be no sexual intercourse until she was better, and that was for over a month. Somervell L.J. thought that the right inference from the evidence was that there were no sexual relations between the spouses after that date. On one occasion the wife called her husband by the co-respondent's Christian name, and he later heard an intimate conversation between his wife and the co-respondent on the subject of

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underclothes. He heard other intimate conversations from time to time which he did not wish to mention. He was upset and the commissioner intervened so that he was not pressed for details. On January 31, 1949, he saw his wife sitting in an armchair and the co-respondent sitting on a chair by her side with his hand up her clothes. On the next day he heard the co-respondent promising her money and a fur coat. At about that date he instructed solicitors, and, through them, inquiry agents.

The inquiry agents had been at the hotel from about the end of January, 1949, though it was not clear that they had been there continuously. It was suggested by them that the husband should find some excuse to absent himself from the hotel. This was done and the excuse was untrue. The agents watched and on February 11 one of them saw the wife and the co-respondent having sexual intercourse. That evidence was accepted by the commissioner. When the husband heard this he said: "My world has gone to pieces", and he showed much distress.

The petition alleged the adultery of the wife with the co-respondent on February 11, 1949, and on divers dates unknown to the husband before that date. After a first hearing, the commissioner adjourned the case as cross-examination by counsel for the wife, in his view, raised issues of connivance and condonation, which ought to be pleaded. The pleadings were amended so as to contain those issues. At the adjourned hearing the commissioner found that adultery had been committed but not before February 11, 1949. He felt, however, that he was bound, reluctantly, as he said, by the decision in *Manning v. Manning* and *Fellows v. Fellows* (1) to come to the conclusion that the husband had connived at that adultery. The plea of condonation was abandoned. Accordingly he dismissed the petition.

The husband appealed.

Nield, K.C., Hines and Waddilove for the husband. On the facts proved here, it was clear that the husband believed that his wife had committed adultery with the co-respondent long before February 11, 1949, and probably before Christmas, 1948. He believed that, on reasonable grounds, from what he had seen and heard in the kitchen of the hotel. Connivance must go to the inception of and not merely to the repetition of adultery: *Churchman v. Churchman* (2). It cannot be suggested here that there was connivance on the part of the husband before Christmas, 1948. The issue depends on the state of the husband's mind—whether, with reason, he concluded that there was adultery in 1948, and not whether in fact adultery could be proved as a matrimonial offence, that is, strictly proved, in 1948.

(1) [1950] 1 All E. R. 602.

(2) [1945] P. 44, 50.

Had the commissioner appreciated that the issue was whether the husband believed, with reason, that adultery had been committed in 1948, he would have found against connivance. (On that point counsel was stopped.)

Secondly, the commissioner was wrong in his view that the decision in this case was determined by that of *Manning v. Manning and Fellows v. Fellows* (3). The propositions submitted are: (1.) Connivance must precede the adultery, i.e., the initial adultery; (2.) connivance is an inference which must be drawn from the facts of each particular case. It is of little use to cite a case which has certain similar facts, since the issue is the state of mind of the alleged conniver: *Churchman v. Churchman* (4); and (3.) the actions of the alleged conniver on which reliance is placed must have been done with a "corrupt intention".

The onus of proof lies on the party alleging connivance and the presumption of law has always been and remains against connivance.

[SOMERVELL L.J. It is stated in Rayden on Divorce (5th ed.), at p. 131, that at the end of the case the court must be satisfied on a balance of probabilities, and not beyond all reasonable doubt. This seems to put a greater burden on the petitioner than is placed on him by *Churchman v. Churchman* (4).]

[Judgment of Denning L.J. in *Tilley v. Tilley* (5) referred to on onus of proof.]

If a husband suspects adultery on the part of his wife, but there are no reasonable grounds for his suspicion, the suggestion of connivance may arise, because the court might infer that the husband did not in fact believe that there was adultery: see *Emanuel v. Emanuel* (6). But that was not the case here. It is clear that Willmer J. in *Manning v. Manning* (7) took too extended a view of what constituted connivance: see the part of his judgment cited by Bucknill L.J. (8). If a man is satisfied that his wife is carrying on an adulterous intercourse and that his marriage has already been broken up and thereupon sets a watch upon his wife to secure proof of the adultery, that is not connivance. [Lord Westbury's speech in *Gipps v. Gipps* (9) was referred to by the court.] All the evidence here points to the fact that the husband's actions were due to his desire to secure proof of that which he believed on reasonable grounds and that he had no corrupt intention. Tucker L.J., in *Woodbury v. Woodbury* (10), said: "The doctrine of connivance is based on "the principle that the complaining spouse must come to the

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(3) [1950] 1 All E. R. 602.

(4) [1945] P. 44.

(5) [1949] P. 240, 259.

(6) [1946] P. 115.

(7) [1950] 1 All E. R. 602.

(8) Ibid. 603.

(9) (1864) 11 H. L. C. 1, 21.

(10) [1949] P. 154, 165.

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 1950 "give relief to one who had been willingly blind to or had
 encouraged the adultery of his or her matrimonial partner".

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 v. sheet anchor.]
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Havers K.C. and *C. J. A. Doughty* for the wife. The corrupt intention which has to be shown is that of promoting and encouraging the adultery, and the intention can only be shown objectively, that is, by the action taken by the husband. There could not be a plainer case of a husband promoting his wife's adultery than that shown by the evidence in this case. The kitchen is the locus provided; apparatus is set up for both seeing and hearing what takes place in the kitchen; when familiarities are observed the husband takes no steps to intervene and prevent what he fears may occur; and this continues over a period of months. "Without doubt, connivance on the part of the husband will, in point of law, bar him from obtaining relief on account of the adultery which he has *allowed* to take place": see the judgment of Sir John Nicholl in *Rogers v. Rogers* (12). That was, in this case, the adultery of February 11, which, by his deliberate refusal to intervene, the husband allowed to take place. Passive acquiescence is enough. Sir John Nicholl later cited this passage from the judgment of Lord Stowell in *Moorsom v. Moorsom* (13): "though to bar the husband there must be intention on his part, I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy; he would be *particeps criminis*". The husband's passivity in this case was succeeded by active conspiracy; he laid a trap for his wife; and his passivity, followed by activity, succeeded: see also *Lovering v. Lovering* (14).

The doctrine of connivance depends on two maxims: (1.) *volenti non fit injuria*, and (2.) that a complaining spouse must come into court with clean hands. As Lord Stowell said in *Lovering v. Lovering* (14): "There is one circumstance here which distinguishes this husband's conduct from proper consent, and marks an improper consent. If he were induced to forgive his wife, yet when he sees an indecent familiarity with his own apprentice, would he suffer the man to remain one moment in his house? This is impossible to reconcile with a due care of his own honour. . . . The act of his permitting him to continue in his house, after he knew of great and indecent familiarities and till she is guilty with another, amounts almost to consent; and is a degree of delinquency which renders him unworthy of a remedy as far as that man is

(11) [1950] P. 173.

(12) (1830) 3 Hagg. Ecc. 57, 58.

(13) (1792) 3 Hagg. Ecc. 87, 107.

(14) (1792) 3 Hagg. Ecc. 85, 86.

"concerned". In *Timmings v. Timmings* (15) Lord Stowell, speaking of a husband, said: "But that he is to contrive the meeting, that he is to invite the adulterer, then to decamp and give him the opportunity, I do think that amounts to legal prostitution": see the notes to that passage (16).

[DENNING L.J. If a husband facilitates the first act of adultery that is so; but what is said here is that the husband was convinced that, by Christmas, 1948, adultery had already taken place. What he proposed was to obtain proof one way or the other. It is clear that he would have been gratified if he had found that in suspecting his wife he was in error.]

Hodson J., in *Mudge v. Mudge* (17), put the first issue when, after stating that the husband had reason to believe that his wife had committed adultery, he said: "Whether he was present himself, or whether he sent detectives, the question is: did he connive at his wife's adultery by simply doing nothing to prevent her from committing it?"

In that case, Hodson J., after considering the phrase "passive acquiescence" used by Sir John Nicholl in *Rogers v. Rogers* (18), answered the question which he had put in the negative. In *Glennie v. Glennie* (19) it was held that to establish connivance it was not requisite that a husband should have taken active measures to bring about the adultery: it was sufficient if he was cognizant that adultery would result from transactions of which he approved and to which he consented.

[BUCKNILL L.J. According to *Churchman v. Churchman* (20) there must be a corrupt intention. The acquiescence, therefore, must show that intention.]

The husband here lulled both his wife and the co-respondent into a sense of security; he continued to live with his wife, though, apparently, after Christmas, 1948, for a month, on doctor's advice, there was no sexual intercourse between husband and wife. But this was not merely a case of corrupt acquiescence: the husband took active steps, by announcing his absence from the hotel, to afford his wife the opportunity to commit adultery. As Lord Merriman P. said in *Churchman v. Churchman* (21): "The issue is whether, on the facts of the particular case, the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery". Somervell L.J. in *Woodbury v. Woodbury* (22) said that this sentence contained a concise definition of the essentials of connivance. The

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(15) (1792) 3 Hagg. Ecc. 76, 82.

(16) Ibid. 82.

(17) [1950] P. 173, 175.

(18) 3 Hagg. Ecc. 57, 59.

(19) (1862) 32 L. J. (P. & M.) 17;
11 W. R. 28.

(20) [1945] P. 44, 52.

(21) [1945] P. 44, 52.

(22) [1949] P. 154, 163.

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Hines replied.

Cur. adv. vult.

July 25. The following judgments were read:—

SOMERVELL L.J. I will state the principles of law laid down in *Churchman v. Churchman* (23). The main issue in that appeal was whether the wording of s. 4 of the Matrimonial Causes Act, 1937, had altered the law by placing on the petitioner an increased burden of proving that he had not been guilty of connivance. It was suggested that the wording of the new Act had created a presumption of connivance. In the considered judgment of the court delivered by Lord Merriman P. this was expressly negatived. Connivance must be strictly proved and the presumption of law has always been and remains against connivance.

The issue involved a consideration of earlier authorities and there are statements of the law which are relevant. Thus: "It is of the essence of connivance that it precedes the event, and, generally speaking, the material event is the inception of the adultery, and not its repetition, although the facts may be such that connivance at the continuance of an adulterous association shows that the husband must be taken to have connived at it from the first" (24). The judgment later refers to the difficulty created by attempts to lay down general principles of wider application than was necessary for deciding the particular case, and then this passage follows (25): "In our opinion it is of the utmost importance to bear in mind that the issue is whether, on the facts of the particular case, the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery". There was some discussion before us as to the meaning of the word "corrupt". It may be difficult to envisage an intention to encourage adultery which is not "corrupt". It certainly emphasizes what is also stated to be "all important", namely the petitioner's "state of mind".

I would like to add a word on the necessity of connivance being strictly proved. It is stated in Rayden on Divorce (5th ed.), at p. 131, that at the end of the case the court must be satisfied that there has been no connivance, but it need only be satisfied on a balance of probabilities, and not beyond all reasonable doubt. In effect at that stage the burden is on the petitioner and this formula seems to put a somewhat greater burden on him than is placed by *Churchman v. Churchman* (26). It might be read

(23) [1945] P. 44.

(24) Ibid. 50.

(25) [1945] P. 52.

(26) [1945] P. 44.

as implying that if the balance of probabilities were in favour of connivance that would be sufficient for the court to find connivance; but *Churchman v. Churchman* (26) assimilates connivance to matrimonial offences of which strict proof is required. This affects an important issue in the present appeal. In considering the issue of connivance, the inception of the adulterous association may be of great importance. If the balance of probabilities leads to the conclusion that the adultery began at or about a certain date, that date ought I think to be taken in considering the issue of connivance, although adultery at that time might not be sufficiently proved for the purpose of granting a decree.

[His Lordship then stated the facts substantially as above set out, and continued:—] The commissioner in substance accepted the petitioner's evidence which he said was given with commendable frankness. Accepting, as did the commissioner, the husband as an honest witness, there is no doubt in my mind that, when the husband fixed speaking apparatus from bar to kitchen, so that he could hear what was said in the kitchen, and removed the bolt, so that he could see into the kitchen, he would have been greatly satisfied if his observations had shown his suspicions to be without foundation. There is no suggestion that he had ceased to care for his wife. The husband was greatly distressed when proofs of his wife's clandestine association with the co-respondent led him to the conclusion that his married life was at an end. The husband said that his hearing his wife tell the co-respondent that she was late with her periods proved to him beyond doubt that his marriage was finished. When adultery was finally proved, he said: "My world has gone to pieces", and was in a most distressed state. If and in so far as it is necessary, on the issue of connivance, I would hold that an adulterous association existed at about Christmas, 1948, between the wife and the co-respondent. The husband was asked why he did not forbid the co-respondent to come to the house. His answer was that if he had sent him away, they would have met elsewhere. He was determined to get the evidence of what he believed was going on and he said that if he had charged them before he had obtained full evidence, he would have been ridiculed with cruel words.

The acts primarily relied on as constituting connivance arose later on February 11, 1949, but Mr. Havers, for the wife, also relied on events up to that date. The application of the law as laid down in *Churchman v. Churchman* (26) to particular facts may well raise difficult problems. In the present case, as it seems to me, the husband was not intending to encourage or promote an adulterous association, but seeking proof of what, from Christmas, he rightly believed to exist. In every case in

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which a husband who believes his wife is committing adultery has her watched, it can be said that if he warned her she was going to be watched, no act of adultery would have taken place on that occasion. It would be absurd to suggest that this in itself amounted to connivance: see *Mudge v. Mudge* (27).

The commissioner felt unable to find any adultery before February 11. If there had been no issue of connivance, it may be that the strict proof required for adultery would not have been satisfied before February 11. In considering connivance however, one has to have regard to the petitioner's state of mind and may have to arrive at a conclusion as to the inception of the adultery on, at the best for the wife, a balance of probabilities. On this basis, the procedure adopted on February 11 was, as I hold, a considerable time after the inception of the adulterous intercourse and cannot be relied on as connivance at what is "generally speaking the material event", namely, the inception. If it is suggested that it is connivance at its continuance, then does it show that the petitioner must be taken to have connived at it from the first? Everything as it seems to me points in the opposite direction. I am satisfied that the petitioner regarded this association as a disaster. He cannot be taken to have intended to encourage and promote it. His intention was to get evidence of what he believed existed, an association which meant that "his world had gone to pieces".

The commissioner gave a careful and clear judgment. With respect, I think that he went wrong in considering the issue of connivance on the basis that no adultery had been committed before February 11. He was not satisfied beyond reasonable doubt that the "inception" was not earlier. "It is equally probable that February 11 was the first occasion". I think myself, as I have said, that the balance of probabilities was greatly in favour of adultery before February 11. Then the learned commissioner felt himself bound by *Manning v. Manning* and *Fellows v. Fellows* (28), reluctantly to hold that the petitioner was guilty of connivance.

In that appeal two petitions were involved, one by Manning on the ground of the adultery of his wife with Fellows: the other by Mrs. Fellows on the ground of the adultery of her husband with Mrs. Manning. There are undoubtedly points of similarity between those cases and this. There was a microphone used. Normal married life, including in that case intercourse, was continued after suspicions had been aroused and while steps were being taken to detect the pair. The adultery, in that case, the only adultery, relied on in the petition was on an occasion when Manning told his wife he would be away for the night.

(27) [1950] P. 173.

(28) [1950] 1 All E. R. 602.

He then went to the garage to listen at the microphone and as a result of what he heard returned and found the parties in the act of adultery.

It is I think dangerous, particularly in this area where the state of mind of the petitioner is all important, to argue from the facts of one case in deciding another. In *Manning v. Manning* (28) the judge clearly found that the two petitioners were acting in concert. He also said (29): "I find as a fact that "she" (Mrs. Manning) "did, as she says, request her husband "to be allowed to drop the friendship with the Fellows. The fact "that this request was refused confirms me in concluding that "from a time certainly as early as August, Mr. Manning and "Mrs. Fellows, so far from attempting to stop the association "between their spouses, not only acquiesced in its continuance, "but did all they could to foster and encourage it, while at the "same time taking pains to conceal from their spouses what "they already knew and suspected".

Hodson J. in the Court of Appeal regarded the interview between Mr. and Mrs. Manning as affecting Manning only. I think that the trial judge regarded it as a step in a joint plan. There seems to me to have been evidence in that case on which the judge could well find that these two from the outset hoped that the association would become adulterous, and so far from regarding that as the end of the world in which they had hoped to live, were anxious that it should happen. The procedure adopted on the final occasion was a step in the carrying out of this intention formed some time earlier. Mrs. Manning had asked her husband to protect her from a man who was, she felt, getting a hold over her. The wife in this case, when taxed, told her husband not to be silly as the co-respondent had no hold over her. I do not think that *Manning v. Manning* (30) is an authority which compels me to find connivance in this case.

It does not appear from the report of *Manning v. Manning* (30) that *Churchman v. Churchman* (31) was there cited. Although, as I think, there was clearly evidence in that case on which the judge could find connivance, there is a passage in the judgment of Bucknill L.J. (32) which, taken out of its context, might be read as inconsistent with what was laid down in *Churchman v. Churchman* (31). I refer to the passage in which Bucknill L.J. referred to the fact that Manning was acting on his solicitor's advice and to his desire to find out whether his wife was unfaithful, as irrelevant and immaterial. Those facts may well have been so in that case and generally, but if the petitioner's state

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(29) *Ibid.* 604.

(30) [1950] 1 All E. R. 602.

(31) [1945] P. 44.

(32) [1950] 1 All E. R. 603.

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of mind is important I can imagine circumstances in which they might be relevant. The commissioner in the present case would, I think, have regarded the fact that the petitioner was acting on his solicitor's advice as material, but for the passage to which I have referred. In the next sentence Bucknill L.J. said the question is whether the petitioner encouraged and promoted the adultery which took place on October 2, 1948. It is clear, from the rest of Bucknill L.J.'s judgment, that that question had to be answered not merely by considering the fact that on that occasion the husband said he was going to be away for the night, but in the light of the whole previous history.

These are difficult cases, and I agree with what was said in *Churchman v. Churchman* (31) as to the danger of laying down general rules, but for the reasons I have given I do not think the petitioner here was guilty of connivance. The appeal should therefore be allowed.

DENNING L.J. The question in this case is whether a husband, who suspects his wife of adultery, is entitled to keep watch on her or to lay a trap for her. The answer depends on whether his conduct amounts to connivance.

The principle on which connivance is founded is *volenti non fit injuria*. That was laid down by Lord Stowell in *Forster v. Forster* (33) and by Sir John Nicholl in *Rogers v. Rogers* (34), and has never been doubted since. *Volenti* is very different from *scienti*. It is not the knowledge of what may occur which bars a husband from complaining. It is his consent to it. A husband cannot complain of his wife's adultery if he has, theretofore, by his words or conduct, consented to it taking place. But the consent, to be a bar, must be a consent to the inception of the adultery. "It must be borne in mind," said Lord Chelmsford in *Gipps v. Gipps* (35), "that the offence of adultery is complete in a single instance of guilty connexion with a married woman. It is the first act which constitutes the crime, and though the adulterous intercourse between the parties should continue for years, there is not a fresh adultery upon every repetition of the guilty acts, although all and each of them may furnish proof of the adultery itself." In that passage Lord Chelmsford recognizes the fact—for fact it is—that the first act of adultery marks a turning point in the relationship of the guilty pair. It means that they have swept aside all scruples and committed themselves beyond recall. Thereafter, repetition becomes easy and, I fear, likely. The material event therefore, as this court pointed out in *Churchman v. Churchman* (36), is

(33) (1790) 1 Hagg. Con. 144, 146.

(34) 3 Hagg. Ecc. 57.

(35) 11 H. L. C. 1, 28.

(36) [1945] P. 50.

the inception of the adultery and not its repetition. It follows that the consent of the husband which is to bar his claim must be a consent to the adultery before it starts.

When this is realized it becomes plain that, once a husband suspects that an adulterous intrigue has already started, he is not guilty of connivance simply because he watches for proof of it. He is not then consenting to the inception of adultery, but only seeking for proof of its repetition. In order to obtain the proof, he may even acquiesce in its continuance, but that is not connivance. In every case where a husband or his agents keeps watch on his wife, to see if she is keeping an illicit assignment, he can be said to acquiesce in her adultery, because he has only to warn her beforehand that she will be watched and she will of course abstain from keeping the appointment. But such acquiescence has never been held to be connivance. The reason is because, in connivance, it is essential that there should be a corrupt intention on his part. This was pointed out by Lord Stowell in *Hoar v. Hoar* (37), and has been repeatedly affirmed since. Now a man who sets watch on his wife, whom he suspects of adultery, cannot be said to have a corrupt intention. He is seeking to discover the offence, not to promote it or encourage it. Some people may think it discreditable of him to spy on her, but on balance it is more to the good of the community that he should be at liberty to find out her guilt by keeping watch, rather than that she should escape with impunity. That was the rule of the civil law as appears from a passage from Sanchez' *de Matrimonio* ((1654) lib. 10, disp. 12, No. 52): "A man who suspects his wife of adultery is allowed to keep watch on her with suitable witnesses, so that he may give proof of her adultery: for that is not conniving at her sin, but discovering her guilt so that he can get his remedy. It is one thing to request, counsel or command evil to be done; that is not allowed. But it is quite another thing to permit, or not to interfere with the doing of evil. That is sometimes allowed as being the greater good".

That passage was quoted with approval by Lord Stowell in *Timmings v. Timmings* (38), and by Dr. Lushington in *Phillips v. Phillips* (39), and I do not doubt that it is as valid in our law as it was in the civil law. In *Mudge v. Mudge* (40), where the parties were separated, Hodson J. held that the husband who kept watch was not guilty of connivance: and in *Harrison v. Harrison* (41), recently before this court, where husband and wife were still sleeping in the same bed, no one suggested that his

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(37) (1801) 3 Hagg. Ecc. 137, 140.

(40) [1950] P. 173.

(38) 3 Hagg. Ecc. 76, 82.

(41) (1950) Not reported.

(39) (1844) 1 Rob. Ecc. 144, 159-

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This case goes one step further than watching, because the husband deliberately left the house so as to let the guilty pair believe they were alone, and then had them watched. By so doing he not merely acquiesced in the adultery, he created an opportunity for it. Does this added element make him guilty of connivance where mere watching would not? I think not. This court is not concerned with the ethics of the matter. The question is, which is the greater evil? To allow the adultery to continue undetected and unproved? or to allow the husband to obtain his proof by creating an opportunity for it? My answer is that, if a husband honestly believes that adultery has already taken place, it is very necessary that his suspicions should either be confirmed or disproved. Merely asking her about it may not suffice. The circumstances may be such that the husband cannot be expected to accept the bare denial of the guilty pair. They often deny the truth. It is better that he should be able to get their adultery proved or disproved, even by creating an opportunity for it, rather than that the suspicion of it should continue to ruin his peace of mind and his home. It is, of course, altogether different if he throws them together before he believes that adultery has taken place. If he sees an association ripening into close friendship and then promotes and encourages it to turn into adultery, he is guilty of connivance. He then has a corrupt intention, because he is not seeking to prove an existing offence, but is trying to provoke a new one. He is then truly an agent provocateur. So also if he, being already guilty himself, wants a divorce for his own reasons, and then throws his suspected wife into temptation so as to obtain proof for his own ends. That is also a corrupt intention. But when an innocent husband is only seeking to discover proof of an adulterous intrigue which he quite reasonably believes is already going on, the creation of an opportunity for it is not of itself connivance. In support of this view perhaps I may quote further from Sanchez, a passage following that which I have already cited: "Gamekeepers," he says, "who absent themselves in order that poachers may come freely and take game are to be punished; but if they do so in order that the poachers may return and be caught, they should be excused. So also a husband cannot complain of adultery which his wife commits with his knowledge and approval; but that is not so when his dissimulation is not by way of consent but in order to gain proof of her adultery."

If it be objected that this view involves an inquiry into the husband's belief, that is, into his state of mind, I say that that is just as it should be. It is clear that in this case, if the

commissioner had been satisfied that the wife had committed adultery before the fatal night, the husband would not have been found to be guilty of connivance: because he could not then be said to have consented to the inception of it. His guilt or innocence cannot depend, however, on the view which a court may ultimately take of the evidence before it, which may be different from that which the husband had before him. It must depend on the husband's state of mind at the time. That has always been laid down, right from *Phillips v. Phillips* (42) to *Churchman v. Churchman* (43). And, when considering his state of mind, it must be remembered that he is presumed to be innocent of connivance. He may quite reasonably believe that his wife is indulging in an adulterous intrigue on evidence which would be quite insufficient to establish it in a court of law. When there are reasonable grounds for his belief, his conduct in testing his belief is not evidence of connivance: because he must, in fairness, be given the credit of believing it and of seeking only for the necessary proof. But if there are no reasonable grounds for his belief, a suspicion of connivance arises, because it may be inferred that he did not in fact believe it. If he then promotes and encourages an act of adultery, by throwing the pair together, he may be called on to explain it; because at the end of the case the court must be satisfied, on the balance of probabilities, that there was no connivance: *Emanuel v. Emanuel* (44).

Manning v. Manning and *Fellows v. Fellows* (45) is distinguishable. As Hodson J. pointed out, that case, as pleaded and fought, concerned one act of adultery only; and that act was clearly promoted and encouraged by the petitioners. The court was not asked to consider whether the adultery had started earlier, or whether the petitioners honestly believed that it had, or what the effect in law would be of such a belief. So the points which we have been considering did not arise. The decision itself is not open to question because the connivance at the continuance of the adulterous association was so provocative that the petitioners must be taken to have connived at it from the first, an exceptional state of affairs which was envisaged in *Churchman v. Churchman* (46).

Applying these principles in this case, the conduct of the husband may be divided into two parts: (1.) After his suspicions were aroused, he watched and eavesdropped. That did not amount to connivance. He then heard and saw things which gave him reasonable grounds for believing that they were indulging in an adulterous intrigue. He lacked the proof necessary to

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(42) 1 Rob. Ecc. 144.

(43) [1945] P. 44, 50.

(44) [1946] P. 115, 118.

(45) [1950] 1 All E. R. 602.

(46) [1945] P. 44, 50.

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establish it in a court of law but nevertheless he had reasonable grounds for believing it. He should therefore be given the credit of believing it and of seeking only for the necessary proof; (2.) in the course of his search, he created an opportunity for adultery, by purposely leaving the pair together alone. That does not in the circumstances give rise even to a suspicion of connivance.

The appeal should therefore be allowed.

BUCKNILL L.J. I agree that the appeal should be allowed, and wish to add a few words on one point only. In the course of my judgment in *Manning v. Manning* (47), I said in effect that the point that Manning was acting on the advice of his solicitor was irrelevant. I did not intend this statement to mean that such action was irrelevant to the question as to the state of Manning's mind on the subject of his wife's possible or probable adultery with the co-respondent. I intended to say that if Manning deliberately encouraged and promoted his wife's adultery, the fact that he did so on the advice of his solicitors did not in my opinion protect him against the charge of connivance.

I also said in my judgment that the question whether the husband's only desire was to find out whether the wife was unfaithful was immaterial, and that the question was whether he had encouraged and promoted the adultery proved to have taken place on the particular occasion charged. I did not intend my words to mean that I thought that the state of mind of the spouse charged with connivance is, in all cases, irrelevant. At the same time, when one is considering the question of connivance in this case, the relevance of the state of the husband's mind on February 11, when he deliberately went away from his house in order to leave the wife and co-respondent alone there, raises in my mind a question of some doubt and difficulty. Primarily, I think that the court should consider the husband's conduct objectively, i.e., should consider what its natural and probable result would be with regard to encouraging and promoting the wife's adultery, rather than consider his intention. At the same time I cannot say that his intention was irrelevant to the question of connivance.

The questions in this difficult case seem to me to be: (a) was the adultery which was proved to have been committed on February 11 the natural and probable result of the husband's conduct in leaving his wife and the co-respondent alone on that date?; (b) did the husband desire his said conduct to promote

his wife's adultery?; and (c) did his said conduct in fact encourage and promote adultery?

As regards (a), I do not think it proved that the adultery was the natural and probable consequence of the husband's absence. As regards (b), I think that the evidence shows that he did not so desire it. As regards (c), I think that the husband's conduct made the adultery more easy and therefore more likely. To this extent I must hold that his absence promoted the adultery.

For these reasons, in the particular circumstances of this case, I do not think that the husband connived at the wife's adultery on February 11, the only date on which adultery is proved to have occurred.

The appeal will be allowed. A decree nisi will be granted to the husband from today and damages are to be assessed at £500. They must be paid into court within fourteen days of service of the order.

Appeal allowed.

Solicitors: *Ellison & Co.; Edward Page & Co., Colchester.*

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Husband and wife—Divorce—Maintenance—"Conduct of the parties"—Admissibility of allegations after decree—Order for examination and cross-examination—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 190—Matrimonial Causes Rules, 1947 (St. R. & O., 1947, No. 523, L/9), r. 52.

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A respondent husband is estopped in maintenance proceedings from asserting matters inconsistent with the decree; and he is further prohibited from asserting matters (of which he knew) which would reasonably have been expected, if proved, to provide an effective answer to the petition or to produce a different result at the trial, such as mutual decrees instead of a decree to the petitioner alone, or a discretionary decree instead of a decree as of right.

There are, however, cases where the earlier conduct of the wife has contributed to the final break-up of the marriage although such conduct would provide no effective answer to the petition and would not amount to conduct conducing; and it is not just that such conduct should be put beyond the scope of criticism. The rights of a wife who has always been selfish and unloving ought not to be identical with those of a wife who has always been loving and unselfish. Where the husband's income leaves available for the

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injured wife only enough to supply the bare necessities of life, the difference may be negligible; but, where the husband's means enable the wife's portion to be more generous, a bad wife should not enjoy as much luxury as a good wife.

Registrars should not, however, lightly condemn a wife merely because during the married life she has been found wanting in good temper or good judgment on isolated occasions retrospectively collected by an erring husband.

A wife by her petition for divorce alleged that she had been deserted by her husband and included a prayer for maintenance. The husband did not file an answer or defend the divorce proceedings, but he informed her by his solicitors that it was his intention to put forward in the maintenance proceedings, as affecting the provision which the court should order, certain conduct of the parties during the married life. A decree nisi was pronounced, which was subsequently made absolute. In the maintenance proceedings the husband filed various affidavits which recited alleged quarrels and unhappiness during the married life, and alleged recent failure by the wife to respond to overtures for reconciliation. His application by summons to the registrar for an order for examination and cross-examination of the parties was dismissed.

Held, that, in so far as it might be relevant to maintenance, the allegation that the wife had failed to respond to attempts at reconciliation was inconsistent with the decree and was therefore inadmissible; but that allegations of conduct which might be held to affect the amount of maintenance but which would not have been reasonably expected to provide an effective answer to the petition, or to produce a different result (since such conduct would not amount to reasonable cause for the husband to leave his wife), were admissible; that they should in the circumstances be reduced to greater precision in an affidavit; and that, if those allegations should be denied by the wife, the proper course would be for the parties, and, if desired, their witnesses, to be examined and cross-examined before the registrar in accordance with r. 52 of the Matrimonial Causes Rules, 1947.

SUMMONS ADJOURNED into court.

In October, 1949, a wife obtained a decree nisi of divorce on the ground that her husband had deserted her. The suit was undefended, and the decree was made absolute in December, 1949. The wife included a prayer for maintenance in her petition, and the husband's solicitors wrote to the wife's solicitors saying that it was the husband's intention, when the application for maintenance was being considered, to refer to the conduct of the parties during the married life as affecting the proper proportion of his income which the court should order as provision for the wife.

Various affidavits were in due course filed by the husband reciting alleged quarrels and unhappiness during the married life,

the wife's early lack of response to his love, her lack of co-operation in his efforts to succeed in his profession, and her more recent lack of response to his overtures for a reconciliation.

The husband applied by summons to the registrar for an order "that the [husband] and the [wife] do attend before the registrar for examination and cross-examination upon all matters arising out of the wife's application for maintenance". Mr. Registrar Townley Millars dismissed that summons, first, on the ground that the application was premature as discovery had barely been concluded, and, secondly, on the ground that, since the matters now raised had not been put forward at the trial, the husband was not entitled to investigate or give oral evidence of the wife's conduct during the married life. The husband appealed to the judge, and the case was adjourned into court.

R. J. A. Temple for the husband. The relevant statutory provision is unambiguous: by s. 190 of the Supreme Court of Judicature (Consolidation) Act, 1925, the court must have regard to the conduct of the parties, and the court cannot exclude relevant conduct in investigating matters of maintenance. Reliance is placed on *Restall v. Restall* (1), and *Mould v. Mould* (2). *Robinson v. Robinson* (3) is to be distinguished, or else it must be held to have interpreted *Restall v. Restall* (1) incorrectly. The Court of Appeal in *Dailey v. Dailey* (4) accepted by inference the correctness of an investigation, subsequent to decree, into the conduct of the parties; and observations in *Trestain v. Trestain* (5), which might appear to indicate that maintenance should be dealt with by the judge at the trial, must be qualified because *Trestain v. Trestain* (5) was a defended case.

In a practice note on Maintenance—Issue of Adultery (6), it was assumed that an issue of adultery which has not been determined in the suit itself may be raised in maintenance proceedings. There is no indication in the form of memorandum of appearance (7) that a respondent husband must raise issues of conduct in possible maintenance proceedings at the trial or in some pleading not strictly an answer. The practice permits a claim for maintenance after decree and the prayer of a petition in which maintenance is not claimed gives no indication to a respondent that he ought to meet a claim which may not be made until after decree absolute.

(1) [1930] P. 189.

(2) [1933] P. 76.

(3) [1943] P. 43.

(4) [1947] 2 All E. R. 269, n.

(5) [1950] P. 198.

(6) [1934] W. N. 86.

(7) Matrimonial Causes Rules, 1947, Appendix II, Form 5.

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The husband is entitled to cross-examine the wife by virtue of r. 52: see *Bass v. Bass* (8) (r. 52 is equivalent to the r. 191 there relevant).

Donaldson Loudoun for the wife. The word in r. 52 is "may": the matter is therefore discretionary. While it is not contended that conduct of the nature alleged can never be taken into account, it is necessary to know specifically the nature of the allegations, so that the court may be able to rule upon their admissibility. This application is premature until particulars of the allegations are furnished. Proper pleadings are required. [He referred to *Mould v. Mould* (9) and *Restall v. Restall* (10) and the references there made to "pleadings".] Matters which go to the root of desertion must be struck out.

[PEARCE, J. In any event, surely, a list of the charges must be prepared.]

Reliance is placed on *Robinson v. Robinson* (11), *Lindsay v. Lindsay* (12). It is to be remembered that the latter case preceded *Mould v. Mould* (9). The only matters which may now be considered in these maintenance proceedings are matters of which the husband had no knowledge at the time of the trial; matters which were proved in evidence or admitted at the trial; or matters which would have been inadmissible at the trial on the ground of irrelevance. The guilty party will rarely be allowed to show that the petitioner was in any way to blame unless, at the least, he has already raised his complaint in the divorce proceedings.

[PEARCE, J. Why should a wife who has done no more than a bare minimum be rated as high as a completely loyal and devoted wife? Cannot a respondent husband say: "She never "tried to make me happy""]

That might mean that the registrar would have to review the whole of the matrimonial life, in order to grade the wife as a good, bad or indifferent spouse, before assessing the maintenance. It is submitted that a more satisfactory course would be for *all* such matters to be raised at the hearing of the petition, rather than in a subsequent hearing before the registrar. It is indeed to be implied from the report of *Dailey v. Dailey* (13), that the court shall arrive at its decision by considering the transcript of the evidence in the divorce proceedings. See also Denning, L.J.'s judgments in *Trestain v. Trestain* (14), and *Sydenham v. Sydenham* (15).

(8) [1915] P. 17.

(9) [1933] P. 76, 80.

(10) [1930] P. 189, 193.

(11) [1943] P. 43.

(12) [1934] P. 162.

(13) [1947] 2 All E. R. 269 n.

(14) [1950] P. 198.

(15) [1949] W. N. 287; 65 T. L. R. 489.

[PEARCE, J. But those cases were defended.]

Temple in reply. The court must look to the substance and not to the form of the order, and the registrar has precluded by his order dismissing the summons the investigation ordered by the statute.

Two further cases should be considered: *Dunbar v. Dunbar* (16), an undefended nullity suit, and *Chapple v. Chapple* (17), in which delay was considered with reference to maintenance and which does not appear to have been cited in the later relevant cases.

[*Loudoun: Chapple v. Chapple* (17) is not outside my definition, for it concerns matters which were, in fact, raised at the trial.]

Cur. adv. vult.

July 31. PEARCE, J. [read the following judgment, in which he stated the facts and continued:] The question of the conduct of the parties is the important question to be decided. The Supreme Court of Judicature (Consolidation) Act, 1925, provides by s. 190, that in assessing maintenance the court shall have regard to "the conduct of the parties". There is nothing in the Act defining or limiting these words. The judgment of the Court of Appeal in *Wood v. Wood* (18), puts the conduct of the parties first in the list of considerations that should affect the court: see also the observations of Denning, L.J., in *Trestain v. Trestain* (19).

In *Dunbar v. Dunbar* (20), the wife had obtained a decree of nullity. In her subsequent application for maintenance the husband proved that she had gone to live with a man before the proceedings began and, largely on that ground, the registrar refused her maintenance. The Court of Appeal confirmed the report. It is to be noted that the misconduct of the wife was not a matter that was relevant to or could have been raised in the nullity proceedings.

In *Chapple v. Chapple* (21), a wife had obtained an undefended decree of nullity; the husband on the maintenance proceedings alleged that the wife had been guilty of delay and that therefore she should not be entitled to a full share of maintenance since during that delay his financial position had improved. Hill, J., said (22), "Regard has to be had to the fortune of the wife, if any, to the ability of the husband, and to the conduct of the parties. In general the proceedings in court leading to a decree nisi in an undefended case can hardly

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(16) [1909] P. 90.

(17) (1929) 98 L. J. (P.) 95.

(18) [1891] P. 272, 276.

(19) [1950] P. 198, 201.

(20) [1909] P. 90.

(21) (1929) 98 L. J. (P.) 95.

(22) *Ibid.* 97.

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“ be expected to provide sufficient evidence of the conduct of the parties, and therefore the registrar must receive further evidence before he can determine what is a proper sum to allot to a wife having regard to the conduct of the parties. Here there was not sufficient evidence, and I do not think the question of conduct was *res judicata* because the learned President held on decree nisi that the delay was not unreasonable. The President may have thought it reasonable or unreasonable but he made a decree nisi. The registrar, however, has to investigate the conduct of the parties”. In that case, the question of delay being apparent to the judge at the trial, there was no mischief in the husband’s failing to contest the nullity suit on the ground of delay and raising it in the subsequent proceedings.

In *Restall v. Restall* (23), a wife had obtained a decree of nullity on the ground of consanguinity. The Court of Appeal held that in maintenance proceedings the moral conduct of the wife both before and after the ceremony of marriage could be investigated. Lord Hanworth, M.R., said (24): “ It is said that so to hold will be to cast a further burden on the court. I doubt this, because I think the registrar will be able to keep the matters in issue within reasonable limits. It is not in every case that the question of the imposition of a *dum casta* clause arises. I should deprecate this decision being taken as justifying a large number of petty or irrelevant acts between the parties being included in those which the court must consider; but when there is a petition for maintenance, and the term of the continuance of the maintenance has to be fixed, and also perhaps the question of the imposition of a *dum casta* clause arises, I think it is most important that the court should have before it the relevant evidence to enable it to investigate thoroughly the conduct of the parties. It is quite true that in the majority of cases the question before the court is simply one of the financial position of the parties; but there are certain cases in which it is necessary for the court to go outside that, and to make a full investigation into their general conduct”.

Lawrence, L.J., said (25): “ I agree. In exercising its discretion under s. 190, the court is to have regard to the conduct of the parties, and indeed in *Wood v. Wood* (26), Lindley, L.J., places the conduct of the parties first in order in his enumeration of the circumstances which have to be taken into account”. It is to be noted again that in that

(23) [1930] P. 189.

(24) *Ibid.* 195.(25) *Ibid.* 196.

(26) [1891] P. 272, 276.

case the conduct of the wife was irrelevant to the issue of nullity and could not properly have been raised at the trial.

In *Mould v. Mould* (27), the husband allowed his wife's petition for divorce on the ground of adultery to go undefended. Subsequently, on the wife's petition for maintenance, he wished to set up facts justifying him in leaving his wife, namely, her cruelty and undue intimacy with a man (not amounting to adultery). It was held that he could do so. Bateson, J., said (28): "Counsel for the wife seeks to distinguish *Restall v. Restall* (29), not only on the ground that they were proceedings for nullity and not for divorce, but also, as he says, because all these matters which are now set up in this answer could have been pleaded in the divorce suit and might well have been a bar to the decree. He says that it is not right that the respondent should get the benefit of an undefended decree, and then be allowed to set up what would have been possibly a good defence to the petition. I agree with him to a very large extent that it is most inconvenient and very unsatisfactory that such should be the case, but it seems to me I am obliged to follow the decision in *Restall v. Restall* (29). Counsel says that as these matters have been raised by him on the divorce petition, the husband is estopped from setting them up now. I cannot see any estoppel. The matter has never been decided. He says it is estoppel by implied *res judicata*. The matter has never been investigated. It is quite true that if the husband had appeared he might will have gone into these matters. How far these matters may be matters going to the question of amount or going to the question of a *dum casta* clause on a maintenance petition has not been decided, and I do not see how the husband can be estopped from raising them now. The other point counsel makes is that it is in the discretion of the registrar, and that I ought not to interfere with it. It may be that it is to a certain extent within the discretion of the registrar to strike out a pleading or not, but I think that that discretion must be exercised in accordance with the decisions that have been given; and much as I regret that this method of dealing with the case should be allowed, I think I am bound to allow it; although I think that it is most inconvenient and undesirable that a husband should be allowed to lie by, with all these charges, until the maintenance petition comes on to be heard. It leads, at any rate in my view, to something very like collusion, although it may not perhaps amount to it in this case. It means that the registrar will have to try what is practically a divorce case in going into

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(27) [1933] P. 76.

(29) [1930] P. 199

(28) *Ibid.* 81.

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“ all these matters, though no doubt the conduct of the husband
 “ in lying by like this may be a matter which will have to be
 “ considered when the whole case comes to be dealt with ”.

The decision in *Mould v. Mould* (30), was questioned by Sir Boyd Merriman, P., in *Lindsay v. Lindsay* (31). In that case a wife had by her petition for judicial separation on the ground of desertion alleged that her child was a child of the marriage. The husband by his answer did not dispute this allegation. She subsequently filed a supplemental petition alleging adultery to which the husband filed no answer. A decree was pronounced dissolving the marriage and giving to the wife custody of the child. Thereafter in maintenance proceedings the husband sought to reduce the amount of maintenance by alleging that the child was not his and also by putting forward the conduct of the wife as a ground for reduction. It was held that he could not do so.

Sir Boyd Merriman, P., said (32): “ It is quite clearly laid
 “ down by the Court of Appeal in *Restall v. Restall* (33), that
 “ in exercising its discretion as to the amount of maintenance it
 “ is essential that the court should have before it all the relevant
 “ evidence of the conduct of the parties both before and after the
 “ marriage. It is obvious that evidence that the wife has given
 “ birth to another man’s child during the marriage is, of itself,
 “ relevant evidence of conduct, if the evidence is, in the circum-
 “ stances, admissible. In *Mould v. Mould* (34), Bateson, J.,
 “ held that the rule laid down in *Restall v. Restall* (33), extended
 “ to maintenance proceedings in a case of dissolution of marriage
 “ in which there had been no defence to the original petition,
 “ although the conduct in question might have afforded possible
 “ defences which would have been an answer to the original
 “ petition, if pleaded. Speaking for myself, I should desire to
 “ consider the matter further before holding that that result
 “ followed from the decision in *Restall v. Restall* (33). I would
 “ point out that that was a nullity suit based upon the consan-
 “ guinity of the parties. It is manifest, therefore, that
 “ misconduct on the part of the petitioner would not of itself
 “ have afforded any answer; and in fact no question of estoppel
 “ arose in that case.

“ In considering the doctrine of *res judicata*, the distinction
 “ is to be borne in mind between a case in which a party who
 “ has had an opportunity of proving a fact in support of his claim
 “ or defence, and has not chosen to rely on it, is afterwards
 “ precluded from putting that fact before any tribunal, and a

(30) [1933] P. 76.

(31) [1934] P. 162.

(32) *Ibid.* 166.

(33) [1930] P. 189.

(34) [1933] P. 76.

“ case in which the very fact itself has been judicially deter-
 “ mined. The principles relating to both these classes of case
 “ are fully dealt with in the judgment of Lush, J., in *Ord v.*
 “ *Ord* (35).

“ The present case is, indeed, one of the former class,
 “ inasmuch as the respondent deliberately abstained from putting
 “ in issue the paternity of the child in his answer to the wife’s
 “ original petition, and made no answer to the supplemental
 “ petition. Although the Matrimonial Causes Rules, 1924, do
 “ not deal in terms with the effect of the failure of a respondent
 “ to deny specific allegations in the petition, as is the case in
 “ *Ord*, rr. 13, 17 and 19, of the Rules of the Supreme Court,
 “ I think that it is plain that Matrimonial Causes Rules, 1924,
 “ rr. 21 and 22 (a), coupled with the form of answer given in
 “ Appendix No. VI, have the same effect. The specimen form
 “ indicates that the matrimonial offence charged should be
 “ specifically denied; that any counter-charge should be pleaded,
 “ and there is this note: ‘ In like manner respondent is to state
 “ ‘ connivance, condonation or other matters relied on as a
 “ ‘ ground for dismissing the petition’. I have no doubt, as I
 “ was assured is the case, that the practice of this court is to
 “ treat as being admitted any material fact alleged in the petition
 “ which is not expressly stated in the answer to be denied or not
 “ to be admitted.

“ As I have already said, if the matter depended solely on
 “ this branch of the doctrine of *res judicata*, I should have wished
 “ to consider further whether, as was held by Bateson, J., in
 “ *Mould v. Mould* (36), there is anything in the decision in
 “ *Restall v. Restall* (37), which obliges this court to receive on a
 “ maintenance petition evidence of facts which would have
 “ afforded a defence to the petition for divorce, but which the
 “ respondent spouse deliberately refrained from raising in answer
 “ to that petition. But, in my opinion, however the matter
 “ might stand on a mere failure by the respondent to raise the
 “ issue when he had the opportunity of doing so, this is essen-
 “ tially one of the class of cases in which, as between these
 “ parties, a fact ‘ directly in issue in the case has actually been
 “ decided by the court and appears from the judgment itself to
 “ be the ground on which it was based ’; to use the words taken
 “ from Sir James Stephen’s *Digest of Evidence* (10th ed. p. 53),
 “ which was quoted by Lush, J., in *Ord v. Ord* (38), already referred
 “ to. I do not think that this is merely a case of a matter coming
 “ collaterally in question, or of a matter incidentally cognizable,
 “ or of a matter to be inferred by argument from the judgment;

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(35) [1923] 2 K. B. 432.

(36) [1933] P. 76.

(37) [1930] P. 189.

(38) [1923] 2 K. B. 432, 440.

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“ see *Duchess of Kingston's* case (39), and the passage from the judgment of Knight Bruce, V.-C., in *Barrs v. Jackson* (40), cited by Lush, J., in *Ord v. Ord* (41) ”.

In *Robinson v. Robinson* (42), a wife had obtained a decree of divorce on her undefended petition alleging adultery, and the husband subsequently in maintenance proceedings sought to impugn her conduct by alleging that she had committed adultery. Henn Collins, J., held that he could not do so. He said (43): “ It has been contended on behalf of the wife that it is no longer open to the husband to raise the issue of her adultery because it is *res judicata*. That phrase is used to include two separate states of things. One is where a judgment has been pronounced between parties and findings of fact are involved as a basis for that judgment. All the parties affected by the judgment are then precluded from disputing those facts, as facts, in any subsequent litigation between them. The other aspect of the term arises where a party seeks to set up facts which, if they had been set up in the first suit, would or might have affected the decision. That is not strictly raising any issue which has already been adjudicated, but it is convenient to use the phrase *res judicata* as relating to that position.

“ In the present case I have to consider both aspects. First, on the strict interpretation of *res judicata*, was the issue of the wife's adultery involved in the decree which was granted in the divorce? If it was, that issue would be concluded between the parties, and could not be litigated again in these proceedings: *Lindsay v. Lindsay* (44). An allegation of the wife's adultery might, but not necessarily would, have afforded a conclusive answer to her petition. She might still, although convicted of adultery, have obtained a decree because her adultery would only be a discretionary bar. The issue of adultery does not seem to me to be fundamental to the decree nor necessarily involved in it. I, therefore, do not think that the matter is *res judicata* in the strict sense of the term.

“ That, however, does not necessarily dispose of the case because there is the statutory direction in s. 190, sub-s. 1, of the Act of 1925, that, in considering a question of maintenance and security, the court must have regard, among other things, to the conduct of the parties. Mr. Fairweather, relying on *Mould v. Mould* (45), says that the conduct of the husband in not producing the evidence at the hearing of the suit does not affect the position under the sub-section. On the other hand, Mr. Harold Brown says that in the public interest a man ought

(39) (1776) 2 Smith's L. C. (13th ed.), 644.

(40) (1842) 1 Y. & C. Ch. 585, 597-8.

(41) [1923] 2 K. B. 432, 441.

(42) [1943] P. 43.

(43) *Ibid.* 44.

(44) [1934] P. 162.

(45) [1933] P. 76.

“not to be allowed to stand by and allow his wife to obtain a decree which she might not have been granted if the court had known certain facts, and then to set up those facts in opposition to an application for maintenance. This aspect of the matter raises the greater difficulty. I do not think that the question would have arisen but for a doubt which Sir Boyd Merriman, P., expressed in *Lindsay v. Lindsay* (44), where he said (46): ‘In *Mould v. Mould* (45) Bateson, J., held that the rule laid down in *Restall v. Restall* (47) extended to maintenance proceedings in a case of dissolution of marriage in which there had been no defence to the original petition, although the conduct in question might have afforded possible defences which would have been an answer to the original petition, if pleaded. Speaking for myself, I should desire to consider the matter further before holding that that result followed from the decision in *Restall v. Restall* (47)’. *Restall v. Restall* (47) was a case in which the misconduct which was sought to be set up in maintenance proceedings would have had no bearing on the matters in issue between the parties, and, therefore, the learned President, if I may respectfully say so, very wisely declined to regard *Restall v. Restall* (47) as extending to a case in which such misconduct was material to the issue, and I have to decide whether the doubt he expressed whether it extended even to a case where that misconduct might have been material to the issue is well founded.

“The view to which I have come is that, although proceedings under s. 190, sub-s. 1, are separate proceedings from those for dissolution, a party ought not to be allowed to refrain from using at the hearing of a suit for divorce information which he had, or which, but for his carelessness, he might have had, and then, when his pocket begins to be affected, propose to prove that information and put the petitioner to the expense of a separate issue”.

Mr. Temple, for the husband, relies on *Mould v. Mould* (48), and argues that *Robinson v. Robinson* (49) was wrongly decided. He argues that the statute says in clear terms that the conduct of the parties is to be considered; that if *Robinson v. Robinson* (49) was rightly decided all serious consideration of conduct is excluded since there is no blameworthy conduct that might not “have been material to the issue” under a plea of conduct conducing; that he gave notice before the trial that a question of conduct would be raised on the argument; and that *Chapple v. Chapple* (50) was not cited in *Robinson v. Robinson* (49).

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(46) [1934] P. 162, 166.

(47) [1930] P. 189.

(48) [1933] P. 76.

(49) [1943] P. 43.

(50) 98 L. J. (P.) 95.

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He also argues that, unless his contentions are correct, the memorandum of appearance, form 5, which by r. 7 (51) of the Matrimonial Causes Rules, 1947, must be served upon respondents, is misleading to a respondent husband, since it leads him to believe that he can defend on maintenance without defending the petition, and does not warn him that he will not be allowed to raise in maintenance proceedings matters which might have been relevant to the divorce proceedings.

He further relies on a practice note on Maintenance—Issue of Adultery (52), where it is stated: “Where an issue of adultery (not determined in the suit itself) is raised upon a petition for maintenance, permanent alimony, or periodical payments, the direction of the judge should be taken as to how the several issues in the pleadings shall be determined. In order to avoid delay by first taking out an appointment before a registrar the matter may be brought before the judge by summons”. It is, I think, important to note that this direction was given a year after the decision in *Mould v. Mould* (53) and a month before the President doubted that case in *Lindsay v. Lindsay* (54).

Mr. Loudoun, on the other hand, relies on *Robinson v. Robinson* (55), and submits that *Mould v. Mould* (53) was wrongly decided. He contends that the only conduct which can be investigated by the registrar is: (1.) conduct of which the husband did not know or could not reasonably have known at the trial; (2.) matters proved in evidence at the trial, *e.g.*, in the petitioner’s discretion statement; and possibly (3.) matters which must have been irrelevant at the trial. He relies on *Dailey v. Dailey* (56), where the Court of Appeal referred back the case to the learned judge to consider facts shown on the transcript of the evidence at the trial without making any suggestion that he or the registrar should hear the evidence of the parties. In this particular case, he argues, the husband is not entitled to make against his wife any allegations that are not so trivial that the court ought to disregard them as valueless, and that therefore he ought to be precluded from putting them forward. He suggests that the direction of 1934 (57) refers only to adultery by the petitioner of which the respondent could not have known at the trial, a suggestion which makes the direction of extremely limited application. It cannot be intended to refer to adultery subsequent to the maintenance proceedings, since in that case it would have said “on an application to vary”, not “on a petition for maintenance”. He agrees that on his contention the memorandum

(51) Matrimonial Causes Rules, 1947, App. II.

(52) [1934] W. N. 86.

(53) [1933] P. 76.

(54) [1934] P. 162.

(55) [1943] P. 43.

(56) [1947] 2 All E. R. 269, n.

(57) [1934] W. N. 86.

of appearance (form 5) in its present form is misleading to respondents.

Either view in its extreme form may lead to practical inconvenience and injustice. If, as Mr. Temple argues, all questions of conduct are open to the respondent on maintenance proceedings, it is possible for a respondent to allow his wife to secure an undefended decree on the ground of desertion because he wishes to be free, and then, when it has been made absolute, to reduce or extinguish his financial liability by proving that the parting was consensual or even that it was the wife who deserted him. In my view, this offends both against the rule of estoppel and also against public policy since it is a fraud on the court. The fact that a respondent while not defending writes *pendente lite* to say that he will raise certain matters in the maintenance proceedings does not affect the matter. In this case the letter was admittedly not read to the trial judge. If it had been read he could not have dealt with it effectively except by referring it for investigation to the King's Proctor. Such a practice would be obviously undesirable.

On the other hand, if a respondent husband is to be estopped from raising anything that might have been material to the issue in the petition, and if those words are understood to mean that any blameworthy conduct of the wife is to be excluded from consideration (as Mr. Loudoun argues) unless it is so trivial as to be valueless, it would mean that a husband whose wife's conduct was bad, but did not actually justify his leaving her, would have either to turn an undefended into a defended suit by putting in an answer that to his knowledge would not succeed in order that a judge could determine it at the trial from the point of view of maintenance, or to allow her to obtain as much maintenance as would have been awarded to a loving and devoted wife.

I do not think that the authorities compel me to either view in its extreme form. In my view, the correct principles—and they are the principles to be drawn from the President's judgment in *Lindsay v. Lindsay* (58) and from that of Henn Collins, J., in *Robinson v. Robinson* (59) which was founded on it—are these. The respondent is estopped in maintenance proceedings from asserting matters inconsistent with the decree. Further he is, for reasons of public policy, prohibited from asserting matters (of which he knew) which would reasonably have been expected, if proved either to provide an effective answer to the petition or to produce a different result at the trial (*e.g.*, mutual decrees instead of a decree to the petitioner alone, or a discretionary decree instead of a decree as of right). I am not satisfied that this further

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(58) [1934] P. 162.

(59) [1943] P. 43.

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prohibition extends to matters of which he was ignorant at the time of the trial, but which he might have known "but for his "carelessness", to quote the words of Henn Collins, J.

If and in so far as the judgment of Henn Collins, J., in *Robinson v. Robinson* (59) goes further than this, I cannot agree with him. In that case the petitioner's adultery, if known to the court, would have produced a different result. The court would have granted a decree, not as of right to the petitioner, but under its discretionary power, and there might well have been mutual decrees.

I have ventured to put the matter in words slightly different from those in which it has previously been put, because I feel that in this case too narrow a view has been taken of the words in the judgments. In cases near the border line the registrar will, on clearly defined allegations, and on a reasonable view, have to decide on which side of the line the allegations fall, bearing in mind both the importance, on the one hand, of not excluding a just consideration of conduct which the Act in terms requires and which the Court of Appeal has declared to be of primary importance, and the importance, on the other hand, of not allowing a respondent to lie by in order that a decree may be pronounced, and, when it has been made absolute, to raise matters which ought to have been before the court at the trial.

There are cases where the earlier conduct of the wife has contributed to the final break-up of the marriage although such conduct would provide no effective answer to the petition and would not amount to conduct conducing. It is not just that such conduct should be put beyond the scope of criticism. The rights of a wife who has always been selfish and unloving ought not to be identical with those of a wife who has always been loving and unselfish. Where the husband's income leaves available for an injured wife only enough to supply the bare necessities of life, the difference may be negligible. But where the husband's means enable the wife's portion to be more generous I do not think that a bad wife should enjoy as much luxury as a good wife. I respectfully agree with Lord Hanworth, M.R.'s, statement in *Restall v. Restall* (60) that this does not justify "a large number "of petty or irrelevant acts between the parties being included "in those which the court must consider" and that "the "registrar will be able to keep the matters in issue within "reasonable limits". Such limits will also probably be observed by the parties owing both to the fact that it is the respondent husband who will probably be paying the cost of the investigation

and to the fact that he will realize that too tyrannical an investigation is likely to have an effect the reverse of that which he desires. Registrars have a wide knowledge of humanity and its frailties. They will not lightly condemn a wife merely because on the eventful journey of married life she has been found wanting in good temper or good judgment on isolated occasions retrospectively collected by an erring husband.

In this case the alleged conduct of the wife may affect the amount of maintenance. I do not say that it will, but it would certainly be wrong to say that it cannot. That conduct (with the exception of her lack of response to attempts at reconciliation) would not have been reasonably expected either to provide an effective answer to the petition or to produce a different result, since it would not amount to reasonable cause for his leaving her. The allegations are therefore admissible but they must be reduced to greater precision in an affidavit by the husband.

As to her alleged lack of response to attempts at reconciliation, if it is intended thereby to say that a reasonable wife ought not to have acted as she did and that in consequence there was no reconciliation and the marriage came to an end, that allegation is inconsistent with the decree. If it is merely intended to say that, though it was reasonable for her to act as she did, a more loving and forgiving wife could have prevented the breakdown of the marriage, it cannot in my opinion have any effect on maintenance. A wife should not be penalized for failing to show more love and forgiveness than it was reasonable to expect. That allegation is therefore not admissible.

If, as I understand, the other allegations are denied by the wife, the proper course is for the parties to be cross-examined before the registrar: see the observations in the Court of Appeal in *Bass v. Bass* (61), where cross-examination was ordered in similar circumstances under r. 191 which was in the same terms as the present r. 52. It is suggested that this involves the trial of an issue. I do not agree. Subject to the direction of 1934 (62), relating to questions of adultery the correct procedure is a hearing before the registrar (with oral evidence where necessary) as envisaged by Lord Hanworth, M.R., in the passage in *Restall v. Restall* (63), already quoted.

The question of the prematureness of this application (which was only a subsidiary point and could have been cured by adjournment of the summons) is not now of any importance. If the husband delivers within twenty-eight days a fresh affidavit

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(61) [1915] P. 17, 21.

(63) [1930] P. 189, 195.

(62) [1934] W. N. 86.

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more clearly defining his allegations, the wife can deal with them by affidavit, and unless she admits them examination and cross-examination of any witnesses will take place in accordance with r. 52.

Appeal allowed.

Solicitors: *Jaques & Co. for David Thomas, Williamson & Co., Colwyn Bay; Holt, Beever & Kinsey.*

J. B. G.

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 Oct. 16,
 17, 30.

Pilcher, J.

HOPKINS v. HOPKINS.

Husband and wife—Divorce—Jurisdiction—Meaning of “ordinary residence”—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 1—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), s. 13.

The correct interpretation of the words “ordinarily resident” in s. 1, sub-s. 1 (c) of the Law Reform (Miscellaneous Provisions) Act, 1949, is that the principle in taxation cases, that there is no ground for applying a different meaning to the words “resident” and “ordinarily resident” over a defined period is applicable to cases where a wife petitioner claims that the court has jurisdiction to entertain her petition by virtue of that sub-section.

Where, therefore, a wife whose husband was resident and domiciled in Canada presented a petition for divorce in the High Court, and claimed that she had been “ordinarily resident” in this country for a period of three years immediately preceding the institution of the proceedings, although during some six months of the relevant period she had been living with her husband in Canada and neither she nor her husband had at that time had a home in England,

Held, that although, on the evidence, she would have been entitled to a decree of dissolution if the court had had jurisdiction, her petition must be dismissed, for, giving to the words their ordinary and natural meaning, she must be held to have been ordinarily resident in Canada while physically present in that country, and was therefore not “ordinarily resident” in England throughout the relevant period, and had, accordingly, not brought herself within the sub-section.

Levene v. Inland Revenue Commissioners [1928] A. C. 217 and *Macrae v. Macrae* [1949] P. 397 applied.

The husband had left England for Canada in February, 1949, and the court found that he had treated his wife with cruelty over several years. He persuaded his wife, however, to join him in Canada in April, 1949. It was alleged by the petitioner that the husband by his conduct had deserted the wife in February, 1949.

when he was domiciled in this country, and it was pleaded in the further alternative that the court would have jurisdiction by virtue of s. 13 of the Matrimonial Causes Act, 1937.

Held, that by joining her husband in Canada and becoming reconciled to him the wife had thereby condoned all previous matrimonial offences. Section 13 of the Act of 1937 was primarily intended to confer jurisdiction upon the court to deal with the case of a wife whose husband had deserted her and had acquired a new domicile abroad before the wife had instituted proceedings. Since the husband's previous matrimonial offences had been condoned, and since those offences had not been revived by any subsequent matrimonial offence until (on the evidence) both parties had already acquired a new domicile abroad, the court had no jurisdiction to entertain the wife's petition under s. 13.

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PETITION for divorce.

By her petition the wife alleged that her husband had treated her with cruelty, and she prayed for a decree of divorce. She alleged that she and her husband were domiciled in England, or alternatively that she had been "ordinarily resident" in England for a period of upwards of three years immediately preceding the presentation of her petition, and that the court would therefore have jurisdiction by virtue of the Law Reform (Miscellaneous Provisions) Act, 1949 (1). She further alleged that her husband had by his conduct deserted her in 1949, at a time when he was domiciled in England, and pleaded in the further alternative that the court had jurisdiction by virtue of s. 13 of the Matrimonial Causes Act, 1937 (2).

The husband denied the allegation of cruelty and desertion and pleaded that the court had no jurisdiction because he was domiciled in Canada when the petition was presented and because the wife had not been ordinarily resident in England throughout the relevant period in that she was ordinarily resident in Canada between April and September, 1949. He also pleaded condonation

(1) The Law Reform (Miscellaneous Provisions) Act, 1949, s. 1: "The High Court in England shall have jurisdiction in proceedings by a wife for divorce, notwithstanding that the husband is not domiciled in England, if (a) the wife is resident in England and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings; and (b) the husband is not domiciled in any other part of the United Kingdom or in the Channel Islands or the Isle of Man".

(2) Matrimonial Causes Act, 1937,

s. 13: "Where a wife has been deserted by her husband, or where her husband has been deported from the United Kingdom under any law for the time being in force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in England and Wales, the court shall have jurisdiction for the purpose of any proceedings under Part VIII [Matrimonial Causes and Matters] of the Principal Act, notwithstanding that the husband has changed his domicile since the desertion or deportation".

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of the alleged cruelty while the parties lived together in Canada in 1949.

The parties were married in 1943. In February, 1949, the husband went to Canada to try to obtain employment there; and after returning to England he persuaded his wife, who had written to him, saying that in view of his past conduct she proposed to institute proceedings for divorce, to join him there in April, 1949. In September, 1949, she returned to England to fetch the children of the marriage; but when she arrived she found that her husband's mother had taken them to Canada. She remained in this country, and presented her petition on October 11, 1949.

J. E. S. Simon for the wife. On the question of "ordinary residence", reference may be made to *Lloyd v. Sulley* (3), *Reid v. Inland Revenue Commissioners* (4), *Pittar v. Richardson* (5), *Levene v. Inland Revenue Commissioners* (6), *Macrae v. Macrae* (7), and to Dicey's *Conflict of Laws* (6th ed.), at pp. 91 and 187. The fact that a man happens to be "ordinarily resident" in one country for a few months does not mean that he could not be "ordinarily resident" also in another country during a period of three years which included those months, for it is possible in certain circumstances for a man to be "ordinarily resident" in a technical sense in two countries at the same time.

Salkeld-Green for the husband (dealing with the matter of residence). Where a wife has been "ordinarily resident" for five months in another country during the relevant period she cannot be said to have been "ordinarily resident" in England throughout that period. In considering whether or no she was "ordinarily resident" in another country, the court must consider her intentions when she was living there; and on the facts of this case it is submitted that she had not only acquired a Canadian domicile in law by virtue of her husband's change of domicile, she had also acquired one in fact, having at that time intended to make Canada her permanent home. It was not possible for her in those circumstances to be "ordinarily resident" in two countries at the same time.

Cur. adv. vult.

October 30. PILCHER, J., reading his judgment, said that the husband had been guilty of cruelty over several years before he

(3) (1884) 2 T. C. 37.

(6) [1928] A. C. 217.

(4) 1926 S. C. 589, 595.

(7) [1949] P. 397.

(5) (1917) 87 L. J. (K. B.) 59.

sailed to Canada and that although the wife had condoned that cruelty when she joined him in Canada, he was satisfied that the husband had tricked her into returning to England, and that by his conduct he had been guilty of an act of deliberate and calculated cruelty which revived the condoned cruelty, and that the wife was entitled to a decree if the court had the necessary jurisdiction.

His Lordship continued:—The question whether this court has jurisdiction to entertain the wife's suit raises a number of points which are not easy to resolve largely because of the very meagre evidence available for their determination. The matters to be decided can be stated shortly: (1.) Was the husband's domicile of origin English or Irish; (2.) did he before the presentation of the petition lose his domicile of origin and acquire a domicile of choice in Canada; (3.) if the husband had at the material date a Canadian domicile of choice (a) is it established that the wife was "ordinarily resident" in England for the three years preceding the institution of these proceedings, and (b) if so, does s. 1, sub-s. 1, of the Law Reform (Miscellaneous Provisions) Act, 1949, apply retrospectively so as to confer on the court the extended jurisdiction provided for in the sub-section where the suit is instituted before the passing of the Act; (4.) if the husband had an English domicile when he first left for Canada on February 2, 1949, but had lost it and acquired a Canadian domicile when the suit was instituted, was he, on February 2, 1949, guilty of desertion or constructive desertion so as to enable the wife to rely upon s. 13 of the Matrimonial Causes Act, 1937.

[His Lordship considered the evidence and held that, although the husband's domicile of origin was English, by October, 1949, when the suit was instituted he had acquired a domicile of choice in Canada: the very fact that he had got rid of his wife by a trick seemed to confirm that he had then no intention of returning to England. Moreover he had physical control of his children in Canada, the family furniture was on its way there, and he had congenial and remunerative employment there. His Lordship continued:—] Finding as I do that the husband had at the material time acquired a domicile of choice in Canada, I now have to consider whether this court has jurisdiction to entertain the wife's suit under s. 1, sub-s. 1 (a) of the new Law Reform (Miscellaneous Provisions) Act, 1949. [His Lordship read the sub-section and continued:] The wife was clearly resident in England when she began these proceedings, and the facts with regard to her residence during the three preceding years are not in doubt. Apart from a fortnight's holiday in Jersey in May, 1948, and one very short visit to the continent, the wife's residence during the material period, and so far as I know throughout her life, has been in England, except when she went

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to Canada with her husband. She arrived in Canada on April 15, 1949, and left there on September 20, 1949. It would, I think, be impossible to say that during these five months she was resident anywhere but in Canada. During this period she was living in Canada with her husband, and neither she nor he had any home of her or his own in England. It follows that for thirty-one months out of the material thirty-six months immediately preceding the institution of the proceedings the wife was resident in England, and that for the remaining five months she was resident in Canada. If this be so, it is clear that the wife cannot say that she was resident in England for the necessary three years preceding the institution of the proceedings. Can she contend successfully, that although in fact resident in Canada for five months out of the material thirty-six, she was none the less "ordinarily resident" throughout the whole period in England? This is not a case in which it can be, or is contended that the wife had at the same time two physical residences in either of which it was open to her to reside at will. In fact, on my findings she was, after her husband's determination to settle in Canada had crystallized, not only resident but in law domiciled in Canada.

On this state of facts, giving to the words "ordinarily resident for a period of three years immediately preceding the commencement of the proceedings" what I conceive to be their ordinary and natural meaning, I should, on all the facts of the case, have found it difficult to hold that the wife had brought herself within the words of the section.

The matter does not, however, rest there. The meaning of the words "residence" and "ordinarily resident" have frequently had to be considered in tax cases—the period in those cases during which the "residence" or "ordinary residence" was in question being as a rule the fiscal year. In *Levene v. Inland Revenue Commissioners* (8) Lord Cave said: "It remains 'to be considered whether during the period in question the appellant 'ordinarily resided' in the United Kingdom for the purposes of s. 46 of the Act [The Income Tax Act, 1918], and I think that there was material upon which the Commissioners could answer this question in the affirmative. The suggestion that in order to determine whether 'a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be 'ordinarily resident here, appears to me to be without substance. The expression 'ordinary residence' is found in the

(8) [1927] A. C. 217, 225.

"Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual (9) or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. So understood, the expression differs little in meaning from the word 'residence' as used in the Acts, and I find it difficult to imagine a case in which a man while not resident here is yet ordinarily resident here".

In the same case Lord Warrington said (10): "I do not attempt to give any definition of the word 'resident'. In my opinion it has no technical or special meaning for the purposes of the Income Tax Act. 'Ordinarily resident' also seems to me to have no such technical or special meaning. In particular it is in my opinion impossible to restrict its connotation to its duration. A member of this House may well be said to be ordinarily resident in London during the Parliamentary session and in the country during the recess. If it has any definite meaning I should say it means according to the way in which a man's life is usually ordered".

In view of these passages it is not surprising that it is now well recognized in revenue cases that there is no ground for applying a different meaning to the words "resident" and "ordinarily resident" over a defined period where chargeability to tax is involved. While it does not necessarily follow that the same considerations apply when the words have to be considered in an Act of Parliament governing a totally different subject, I am, none the less, bound to pay and do pay respectful attention to the fact that Lord Cave, in discussing the meaning of words which have been the subject of frequent consideration in tax cases, concluded that the word "ordinary" lends no real added meaning to the word "residence".

In *Macrae v. Macrae* (11), where the question was whether a husband was ordinarily resident in Scotland so as to oust the jurisdiction of magistrates to entertain a summons for maintenance of his wife, Somervell, L.J., said (12): "Where there are indications that the place to which he moves is the place which he intends to make his home for at any rate an indefinite period, then as from that date in my opinion he is ordinarily resident at the place to which he has gone".

My own view is, that on the facts of this case, and the words "ordinarily resident" being given their natural meaning, the wife was, whilst physically present in Canada, "ordinarily resident" there. She was clearly resident there, and to find

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(9) *Quaere* "casual".

(11) [1949] P. 397.

(10) [1927] A. C. 217, 232.

(12) *Ibid.* 403.

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that she was also during the period of her stay "ordinarily resident" there involves a conclusion that, on the facts of this particular case at least, the qualifying adverb "ordinarily" adds nothing to the adjective "resident". Such a conclusion accords with the view taken by the highest tribunal in the country when called upon to construe identical and similar words in the Revenue Acts, and also accords with the view of the meaning of the words taken by Somervell, L.J., in *Macrae v. Macrae* (13). It follows that if the wife was ordinarily resident in Canada during her five months sojourn, then she was not "ordinarily resident" in England during the three years preceding the commencement of the proceedings, and that this court has no jurisdiction to entertain her suit under the provisions of s. 1, sub-s. 1 (a), of the Law Reform (Miscellaneous Provisions) Act, 1949.

Having regard to my second finding above, it is unnecessary for me to consider the submissions made on behalf of the husband, that the provisions of the Law Reform (Miscellaneous Provisions) Act, 1949, are not retrospective and cannot be invoked by a petitioner who begins proceedings before the Act came into force.

The last point made on behalf of the wife was that the circumstances of the case justified a finding that the husband was, on February 2, 1949, guilty of constructive desertion, and that, inasmuch as he was on my findings on that date domiciled in England, this court had jurisdiction to entertain his wife's claim based upon desertion under s. 13 of the Matrimonial Causes Act, 1937.

[His Lordship read the section and continued:] I have found that the husband did not change his English domicile of origin for his Canadian domicile of choice, at any rate until after he arrived in Canada with his wife in April, 1949. Having regard to the fact that my findings upon his previous submissions as to "domicile" and "ordinary residence" might go against his client, Mr. Simon submitted in the last resort that the husband by his conduct on and immediately before February 1, 1949, when he was about to depart for Canada, evinced an intention to bring cohabitation permanently to an end without cause, and in the premises must be taken, when he left his wife on the following day to fly to Canada, to have deserted her without her consent. Whilst all my sympathies in this case are with the wife I feel myself quite unable to accede to this submission. It is true that in March, 1949, she had made up her mind that her only course was to take divorce proceedings against her husband, presumably on the ground of cruelty. No doubt if on

his return she had refused and persisted in her refusal to have anything to do with him she might have presented a petition based on cruelty, or, after the appropriate period, have instituted proceedings for divorce based on constructive desertion. Unfortunately for herself she did not take this course but became reconciled with her husband and lived with him again as his wife at a time when he still retained his English domicile. She thereby condoned and wiped out all her husband's previous matrimonial offences. Section 13 of the Matrimonial Causes Act, 1937, was intended, primarily at least, to confer jurisdiction on the court to deal with the case of a wife whose husband deserts her and, going abroad, acquires a new domicile of choice before the wife institutes proceedings. In such a case the section confers on the court a jurisdiction, which it would not otherwise have, to entertain the wife's suit based upon any of the matters in respect of which the court can give relief under Part VIII of the principal Act.

It is abundantly clear on the admitted facts that going off to Canada as he did on February 2, 1949, the husband was not then intending to desert or abandon his wife. Any case which the wife then had would have had to be based on cruelty or constructive desertion. She thereafter condoned all her husband's previous matrimonial offences by living with him in the fullest sense. The husband did not thereafter revive his previous matrimonial offences by any cruel conduct until a time when he, and she, had both acquired a new domicile of choice. In these circumstances, I find it quite impossible to say that this court has jurisdiction to entertain the wife's suit under the section in question.

I have arrived at the conclusions set out above with the greatest reluctance. On my findings, however, this court has no jurisdiction to grant relief to the wife who, on the evidence which I have heard, has been cruelly wronged and shamefully tricked by an unscrupulous husband. The petition must therefore be dismissed.

Petition dismissed.

Solicitors: *Lewis & Lewis and Gisborne & Co.; H. D. B. Eaden.*

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Evershed,
M.R.,
Bucknill and
Denning, L.JJ.

Husband and wife—Nullity—Englishman married in Russia—Validity of ceremony—Refusal of Russian authorities to allow wife to join husband in England—Husband's remedy.

A British subject, domiciled in England, in 1945, while he was serving with the Royal Navy in Archangel, met a Russian woman, and attended with her at a Russian register office, where they went through a ceremony of marriage. At that ceremony the registrar failed to comply with certain requirements of Russian law. In particular, no entry of the marriage was made on the parties' passports; no questions were asked of them as to their health; nor were the relevant provisions of the Russian Marriage Code stated to them. The marriage was, however, registered. Two days later the husband left Russia and never thereafter saw his wife. The Soviet authorities refused to allow her to leave Russia or him to join her there.

Held, (1.) that no marriage had come into being in view of the failure of the registrar to comply with the formalities prescribed by Russian law, coupled with the circumstances (a) that shortly after the ceremony all marriages between Russians and foreigners were forbidden by Russian legislation; (b) that the Russian authorities, as soon as approached, made plain that the parties would not be allowed to reunite. Those subsequent actions of the Russian authorities gave the absence of formalities an importance which it might not otherwise have possessed, for the inference was that the responsible authorities never thought or intended that the transaction in the register office form would have effective consequence. The husband was accordingly entitled to a decree of nullity; Denning, L.J., however, preferring to rest his judgment on a different ground.

Held, further, (2.) that the husband's mistaken belief as to the various effects which his marriage would have in Russian law did not constitute such a mistake as to the essentials of the transaction so great and so fundamental as by itself to justify the inference that the transaction of marriage had no binding effect for lack of the husband's consent.

(3.) That there was no ground for holding, apart from any question of consent, that the effect of Russian law was that the man in question did not satisfy the essential requirements of marriage as understood by the court in England, and the husband was accordingly not entitled to relief on that ground. *Nachimson v. Nachimson* [1930] P. 217 explained.

Quare, whether the husband was entitled to relief on the ground that the marriage had been frustrated.

Per Denning, L.J. A marriage may be voidable for failure of a condition imported by the personal law of one of the parties, if they married on the basis of that law. It was a condition of this marriage that the husband and wife should be allowed to live together. That condition was imported by the husband's personal law and was

nullified by the action of the Soviet Government. An essential condition of the marriage having failed, the marriage was voidable in the English courts and a decree of nullity should be pronounced more particularly on that ground.

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APPEAL from Hodson, J. (1).

The petitioner Kenward, a British subject domiciled in England, was serving with the Royal Navy at Archangel, in the U.S.S.R., in 1945, where he met the respondent, Nina Mikolaevna Miklyaeva, a Russian woman. Neither spoke much of the other's language. After they had been acquainted for some time they agreed to marry. The wife took the initiative and approached the official, who was a woman, who conducted marriage ceremonies in Archangel. Some difficulty was encountered and the registrar appeared to have referred to higher authority. Eventually, she notified the wife that if she and the husband attended at 9.30 p.m. on October 16, 1945, the ceremony would be performed. On October 16, 1945, the parties attended before the registrar, and the ceremony was performed. The registrar, however, did not comply with the requirements of the Russian Marriage Code (2). In particular, although she was handed the passports of both parties, she made no entry on them of the marriage as required by s. 133 of the code. The registrar also did not ask the parties the questions required by s. 132 of the code; nor did she read to them the relevant sections of the code in accordance with s. 133. The marriage, however,

(1) [1950] P. 71.

(2) The Russian Marriage Code of 1926 as amended in 1944 provides by s. 2 that: "Registration of a marriage is indisputable evidence of the existence of a marriage".

Section 9: "Both spouses have complete freedom in the choice of occupation and professions. The order of keeping the common household is fixed by mutual agreement between the spouses. A change of place of residence of one of the spouses does not impose on the other a duty to follow the one".

Section 132: "Those registering a marriage are obliged to produce at the time of the declaration documents certifying their identity, and subscribe that no obstacles indicated in Chapter 2, Division 1 of the present Code exist, and also that they are mutually aware of the state of their health and particularly with regard to venereal

"and mental diseases and tuberculosis, and must also indicate into what consecutive marriage, registered or unregistered, each of them enters and how many children he had".

Section 133: "The responsible official registering the marriage is obliged to read to those contracting marriages, ss. 4, 5 and 6 of the present Code, and to warn them about their penal responsibility in case of false statements. After this the inscription made in the register is read, signed by them and countersigned by the official".

"In the passports of the spouses an inscription about the registered marriage is made indicating the surname, christian name, patronymic and of the year of birth of the spouse, and of the place and time of the registration of the marriage".

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was duly registered. After the ceremony husband and wife slept together on the nights of October 16 and 17. On October 18 the husband rejoined his ship and shortly afterwards left Archangel. He had not since seen his wife. The Soviet authorities refused to allow her to leave Russia or to allow the husband to join her in Russia. She had written to her husband that she had visited an institution known as O.V.I.R. and had been informed that she could not leave Russia. The British Government, it appeared, had intervened in the matter with the Soviet Government, but without success.

In this suit the husband sought a decree of nullity. His petition was heard by Hodson, J., with the petitions of three other men who, while serving in Russia, had gone through ceremonies of marriage with Russian women in Russia. The judge dismissed all four petitions on the ground that, although certain of the provisions of the Russian code had not been complied with, the marriages were not thereby avoided as they had been duly registered and registration was conclusive between the parties as to matters of form. The husband appealed.

The wife did not enter an appearance, and was not represented.

Idelson, K.C., and *J. E. S. Simon* for the husband. The husband is entitled to a decree of nullity of his marriage in Russia. The only possibility is for him to obtain relief in the English court, and the case is one of special hardship, seeing that he is prevented from going to Russia, and that the woman whom he purported to marry is prevented from leaving Russia.

The first ground of the appeal is that there was not a valid marriage under the Russian law. Marriage in Russia takes place before a registrar, but in this case the registrar failed to carry out the obligations imposed by ss. 132 and 133 of the code of 1926. Section 132 requires statements to be obtained from the parties that they were mutually aware of each other's state of health and did not suffer from venereal and mental diseases or from tuberculosis. Inquiry is also made whether there has been any previous marriage and if so, whether there were any children of that marriage. These are important matters directed to securing healthy marriages. There was, further, a breach of the obligation imposed on the registrar to enter in the passports of the parties to the marriage the full name and year of birth of the spouses and the place and date of the registration of the marriage. These are, it is submitted, fundamental breaches going to the root of the ceremony. It is true that s. 2 of the Marriage Law of 1926 provides that the registration of a marriage is "indisputable evidence" of the existence of the marriage. This, however, does not prevent proceedings in the Russian courts

under Russian law disputing the validity of the marriage; so that the words "indisputable evidence" have not the absolute meaning that they suggest and the English court must have the same power as a Russian court to consider whether the marriage ceremony was in this case valid. Hodson, J., was wrong in attaching a conclusive meaning to s. 2, which means no more than that the marriage ceremony can only be impugned in a court of law. There is no provision in Russian law allowing a registrar to dispense with any element in the ceremony of marriage provided for by law. The default here was in matters going to the root of the ceremony and affords a ground for annulling the marriage.

Again, there was no valid consensus by the parties to the ceremony. The husband thought that he was entering into a relationship similar to that of a married couple in this country, but, under Russian law, one spouse can leave the other without there being any desertion. There was therefore a complete absence of consensus. In addition, the Russian Government has ensured that the persons who entered into this purported ceremony of marriage shall never meet again. The husband can never have thought that he would be in the position of a widower with a wife living. [They referred to *Warrender v. Warrender* (3).] The differences in the effect of a marriage in Russia and of one in this country are so basic that it cannot be believed that the husband would have married had he realized the position. There was in fact no consensus ad idem. [They referred to Dicey's *Conflict of Laws* (6th ed.), p. 264, and to *Lendrum v. Chakravarti* (4).] The husband's consent was to something which he neither knew nor understood. There was therefore no valid contract. Marriage is a change of status based on contract.

J. E. S. Simon following. It is contended that this never was a valid marriage. This case is not governed by *Nachimson v. Nachimson* (5). In that case the parties were domiciled in Russia at the date of the marriage. This marriage was invalid from its inception as it lacked an essential of an English marriage, namely, the right of the husband and wife to live together. A mutual right of consortium is essential to a valid marriage. Section 9 of the Russian code makes it plain that under Russian law there is no right of consortium. The absence of such a right prevents a valid marriage. If a marriage is potentially polygamous, it will not be recognized in this country. Similarly, a marriage which gives no right of consortium will not be recognized. That a right to consortium is vital to an English marriage is shown by the method of enforcing the right by

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(3) (1835) 2 Cl. & Fin. 488.

(5) [1930] P. 217.

(4) 1929 S. L. T. 96, 105.

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proceedings for restitution of conjugal rights: see *Brodie v. Brodie* (6). Where a marriage is celebrated abroad, the court will look at the *lex loci celebrationis* and not the law of the domicile to see if the marriage is valid. [He referred to the *Law Quarterly Review*, Vol. 48, pp. 341, 352, and *Rex v. Hammersmith Superintendent Registrar of Marriages* (7).]

Secondly, it is submitted that if, owing to the occurrence of an irresistible and extraneous event, neither of the parties can enjoy any of the rights or fulfil any of the obligations of the marriage state, the marriage is frustrated and the courts will declare the marriage terminated. There is nothing in the contract of marriage which prevents the doctrine of frustration from being applied to it. This is not a case of nullity or of divorce, but one where an existing marriage has come to an end by operation of law. It is submitted that why the doctrine of frustration has not previously been applied to marriage is because: (1.) marriage formerly was regarded as a sacrament and accordingly indissoluble; (2.) the doctrine of frustration is itself of recent origin; (3.) the doctrine when applied to marriage is of very limited scope. The mere fact that the contract of marriage creates a status does not make the doctrine of frustration inapplicable.

EVERSHED, M.R. This appeal raises matters of some importance and plainly of the utmost importance to the parties concerned. Its significance goes beyond the individual characters in the case. The appeal is in one of a number of petitions that came before Hodson, J., all being petitions of British subjects, who, during short sojourns in the dominions of the Union of Socialist Soviet Republics, went through marriage ceremonies with Russian women.

It subsequently appeared that the authorities in Russia were unwilling either, on the one hand, to allow the wives to leave the Union and join the several husband petitioners, respectively, or, on the other hand, to permit the husbands themselves to revisit Russia. The husbands therefore found themselves, if the marriages were valid, in the unhappy position of being, so far as can be seen, permanently deprived of any opportunity for further consortium with the women of their choice, but at the same time of remaining in England with the status of married men and therefore unable to marry anyone else.

In the course of his judgment, the judge noted that the conduct of the authorities in Russia might well be said to have shocked the conscience of civilized humanity, and no one approaching these cases can fail to be most sensible of sympathy

(6) [1917] P. 271.

(7) [1917] 1 K. B. 634.

for the persons concerned. But it has been said by a distinguished judge that it is no part of the judicial function to indulge in unregulated benevolence, and the question, therefore, in this case, as in the other cases which came at the same time before Hodson, J., is whether the husband can make good his case and persuade this court to declare either that the so-called marriage was a nullity, or that it should be dissolved.

For various reasons into which it is not necessary to enter, solutions appear to have been found in many of the other cases of this kind; but this case and another (*Whitehead v. Whitehead*), as the judge indicated, stood or fell together. In the case now before us, he came to the conclusion that the petition must fail; but, since it was intimated to him that an appeal would be made to this court, the *Whitehead* case has been adjourned.

I have said that this is a case of considerable public interest, and clearly Hodson, J., so regarded it, for he reserved his decision and delivered, as is his wont, a most careful judgment in which he did justice to all the points which had been raised. We have had the advantage of full argument by Mr. Idelson and Mr. Simon for the husband. In all the circumstances it might well be thought that respect to the judge and to the argument would require that we should also reserve our judgment; but, after we had given the case the best consideration we could, it seemed to us that there would be no point in delay, although we have in the event reached a conclusion different from that arrived at by Hodson, J. In my judgment, there is, in the special circumstances of this case, ground for granting the relief for which the husband prays.

[His Lordship summarized the facts and continued:]

On those facts, various points have been submitted: First, it was submitted here and in the court below that there was an absence of compliance with the form required according to the law of Russia, the *lex loci celebrationis* for a valid marriage in that country. Secondly, it was said that there was an absence of any such consent on the part of the two parties to this ceremony of marriage as to suffice to create the status of marriage. Both these arguments were rejected by Hodson, J. It had been intimated to him that other grounds might be available, though they were not taken. A third ground was that, apart altogether from the question of formalities and consent, there was still no marriage, because, when regard is had to the local law of Russia, the union created by the ceremony on October 16, though called a marriage, did not satisfy the essential requirements of marriage as understood in these courts. To that argument the judge thought *Nachimson v. Nachimson* (8) an answer.

(8) [1930] P. 217.

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The fourth point intimated to the judge but also not taken was that the subsequent actions of the Soviet authorities were such that the marriage must be regarded as having been frustrated. That argument also the judge would have rejected, stating that there was no instance in the books of the doctrine of frustration ever having been applied to marriage as distinct from a marriage contract. Mr. Simon asked to be given leave to put both those two latter points in addition to the ones debated before Hodson, J., and in the circumstances we gave him leave to do so.

Anticipating at this stage the conclusion which I have reached, I am prepared to hold that, in all the circumstances, there was here no marriage. It is plain—and I shall develop the point presently—that all the formalities required by the law of Russia were not complied with. I should for my part be inclined to think that those matters of themselves might not go sufficiently to the root of the matter to enable the marriage to be challenged, assuming it to be open to challenge, having regard to other parts of the code. But it is not here merely a matter of failure to comply with certain formal requirements of the marriage code: it seems necessary to judge whether that failure was essential or not by considering it in the light in particular of two other very important facts.

The first is that, not long after this so-called marriage had occurred, the law of Russia was amended by adding a provision to the code that all marriages between Russian citizens and foreigners were altogether forbidden. Second, the Russian authorities from the first moment when they were approached made it as plain as human agency can make it that, in no circumstances whatever, would they permit the two parties to this so-called marriage to rejoin each other. When those two matters are added to the absence of formalities, the inference I draw is that the authorities responsible in this case, though they eventually, if somewhat casually, carried through the necessary ceremony at 9.30 in the evening of October 16, never intended, thought or supposed that the transaction would ever have effective form or consequence. In other words, the subsequent actions of the authorities seem to me to give the absence of formalities an importance which it might otherwise not possess.

At this stage, I should refer to the necessary Russian decrees. The vital sections of the code are ss. 132 and 133 as amended. The substance of them is this: s. 132 puts upon the parties intending to marry the obligation to subscribe to certain declarations as to the state of their health, physical and mental, and also whether they have been previously married, and so on. Section 133 imposes upon the celebrating official or registrar the duty of reading to the happy pair the appropriate extracts from

the Russian code, which are intended, among other things, to warn them of the grave consequences of making false declarations, and also of the limits of the rights to consortium and other rights which a Russian marriage imposes upon those who marry in Russia. By the amended provisions of s. 133, it is also incumbent upon the registrar, for obvious reasons, to enter on the passports of both parties an entry to the effect that they are married. The sections of the code which the registrar has to read include those which state what are the essential requisites for a valid marriage in Russian law. They include mutual consent, the reaching of marriageable age, and matters of that kind.

But there are further provisions of the code to which I must refer a little more fully, namely ss. 1 and 2. In Russia marriages are purely civil transactions, having no religious significance. Therefore it is provided first that registration is the essential condition of marriage; and secondly, that registration is "indisputable evidence of the existence of a marriage". The sections are as follows: Section 1, "Registration of marriage is established in State and social interests and also with the purpose of protecting the person and property, rights and interests of the spouses and the children. Only registered marriage creates the rights and duties of the spouses provided for by the present code". Section 2: "The registration of marriage in the departments of civil status is indisputable evidence of the existence of a marriage". I have referred to s. 1 because, in considering what was in the minds of those who played a part in the so-called marriage of these two persons, it is, I think, significant that the whole law of marriage in Russia opens with this phrase: "Registration of marriage is established in State and social interests and also with the purpose of protecting the person and property, rights and interests of the spouses and the children".

Two other sections played some part in the argument before us. Section 7 is, I think, not very important, except that it shows the emphasis which the new order in Russia lays upon the equality of the sexes. Either of the two spouses may as his or her married name choose his or her existing name or any other name. Section 9 is a little more important: "Both spouses have complete freedom in the choice of occupation and professions. The order of keeping the common household is fixed by mutual agreement of the spouses. A change in place of residence of one of the spouses does not impose on the other a duty to follow the one". A book produced in court in which these various sections are set out, contains a note to the effect that in 1931 there was a decision of the Supreme Court of the Union, the Civil Cassation Collegium of the Supreme Court of R.S.F.S.R., which is alleged to have laid down that "marriage

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“ does not impose on the spouses the duty of living together ”. I have referred to s. 9 and that decision because they play an important part in other parts of the argument, and I shall therefore have to return to them. But, having read the laws laying down the necessary formalities, it is right that I should state quite plainly that those formalities in certain respects were not complied with in this case.

Thus, it is quite plain from the evidence that no declarations were called for from either of the spouses in accordance with s. 132, stating what was their condition of mind and body, whether they had been married before, and so forth—nothing of that kind was asked. Equally, the registrar forbore to read to the husband and wife any of the relevant parts of ss. 4, 5 and 6 of the code as she was enjoined to do by s. 133. Finally, though she appears to have had in her possession at one time the English and Russian passports of the husband, the registrar also forbore, contrary to s. 133, to make any entry in them of the marriage ceremony or the marriage that she had purported to celebrate. The transaction of the marriage ceremony took a very short time. Although one must make allowance for the fact that the husband's knowledge of the Russian tongue was extremely imperfect, I see no reason why the evidence should not be accepted in which he described the ceremony. He said that they arrived at the office at 9.30 p.m. and that the only other person present was the young woman behind the desk whom I have described, I hope correctly, as the registrar. The wife opened the conversation by saying that they had come along as arranged and that the registrar knew all about it. The husband said that the registrar then “ asked for my British passport and my “ Russian passport, which I handed over ”. Then, (Q.) “ Can you “ remember anything else being said? ” (A.) “ No, I do not “ remember anything else being said except that after she had “ written out the document, she wished us luck, apparently, and “ we went on our way . . . I cannot recollect her signing any- “ thing ”. He said that he did not sign anything, but that they did get a certificate. That was the whole ceremony; it took apparently about five minutes; and, no questions were asked of the parties about their state of health, family and so on. There were certainly no instructions in the proper way of living as married people according to the laws of Russia.

Those are all the facts. Upon them Mr. Idelson argued in the court below and in this court that there was here so great a failure to comply with the formalities that the court should say that there was no marriage as provided by the local Russian law. My own conclusion is that these matters, taken with others, are sufficient to enable us to say here that there was no marriage.

I will presently state my conclusions more precisely on that point, and discuss, in particular, the provision in s. 2 of the Russian code that the registration should be "indisputable" evidence of the existence of a marriage. But first I will consider, though I do not accept them, the other arguments advanced for the husband.

First, the allegation of no consent: the judge said (9): that he thought that it was open to the husband to argue the point of no consent on the footing that the relevant law to be applied in judging whether there was consent on his part or not was English law, and I assume that that is correct. Then he goes on—as I have said, there were several petitioners before him—to say: "The law of England, therefore, applies to the question whether or not they consented to their marriages, and the section of the Russian code as to the conclusiveness of registration does not shut the door against argument directed to want of consent. It is clear that if there is a mistake as to the identity of the person with whom the contract is made, or an erroneous belief as to the ceremony, for example, a belief that the ceremony was one of betrothal and not of marriage, the marriage is void for want of consent. No such mistake can be put forward here, but it is said that in these four cases the marriages were entered into in the mistaken belief: (a) that the administrative Soviet practice of granting permission to wives of foreigners to leave the Soviet Union with their husbands would continue as it had done before the marriages took place; (b) that they would be permitted to go and see their wives after they had parted from them; (c) that the marriages entered into imposed a duty on the spouses to live together, whereas in each case, in fact, by s. 9 of the code no such duty was imposed on them. . . . There is no authority for introducing into the law of England mistakes of this kind invalidating marriage".

I agree: I cannot see myself that there was here so great, so fundamental a mistake as to the essentials of this transaction that the court would be justified in saying that the transaction had no binding or operative effect on the husband whatever. These beliefs and hopes about the future conduct of the Soviet Government were beliefs and hopes. They cannot, as it seems to me, be classified as mistakes of fact or mistakes as to the nature of the transaction into which the husband was entering. I think that the main idea in the mind of both parties was that they would live together in the way, according to the ordinary acceptance of humanity, that husbands and wives do live together. But that fact, I think, is not affected by the circumstances that

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in Russia, if they chose to live there (which they did not contemplate in any circumstances), one party or the other could not have obtained relief in the courts for reasons or on grounds which would give a right to relief in these courts. I therefore leave that point. It is sufficient for me to say that I entirely agree with the conclusion of Hodson, J.

I now pass to the two points which the judge did not determine or only dealt with summarily. Mr. Simon formulated the third point in these words: "Where a British subject domiciled in England enters into a marriage abroad, even though both parties are capable of marrying each other by their own personal laws, and even though the marriage complies quoad formalities with the local law, still the transaction is examinable in this court to ascertain if it also complies with the essentials of marriage as understood by the law of England". I am prepared, for the purposes of argument at any rate, to accept that proposition. I think the argument eventually came to this, that this marriage did not comply with the essentials of marriage as understood by the English law, because of the provisions of the Russian code as regards consortium.

I have already read s. 9 and referred to the decision of the Civil Cassation Collegium, and, if I have understood the argument correctly, it is on that section and that decision that Mr. Simon has based this part of his case. I agree with him that the matter is not determined against him by the decision in *Nachimson v. Nachimson* (10). That also concerned a Russian marriage, but a marriage between two persons domiciled in Russia at the relevant date. The law as to dissolution of marriage in Russia appears to have been different in 1930 (when *Nachimson v. Nachimson* (10) was decided) from what it is today. At the time of that decision, it was possible, apparently, to dissolve a marriage by the simple expedient of one party's stating in the form of a declaration to the other: "This marriage is to end". It is perhaps not surprising that such a matrimonial system was found highly inconvenient in Russia and has been altered. Marriages now may be dissolved, as we understand, by the courts of Russia on any ground which the court thinks justifies the conclusion (to use Mr. Idelson's term) that the marriage had become distorted. In order, however, to dissolve a marriage a decree of the court is necessary. But that was not so at the date of *Nachimson v. Nachimson* (10). A marriage was contracted then, as now, by appearing before a registrar. In that case two Russians, who had been married by going before a registrar in much the same way as the husband and wife here, afterwards left for Paris. Having ceased to have that affection for each other that

they apparently had previously had, one of them, at the Soviet Consulate in Paris, wrote out a declaration stating that the marriage was at an end. The question before the court in *Nachimson v. Nachimson* (11) was in the form of a special case: had the petitioner and the respondent ever been husband and wife? If yea, then was the marriage dissolved on the day in Paris on which the declaration was executed?

The relevance of that case here is on the main question, had this husband and wife ever been man and wife? Hill, J., was of opinion there that a negative answer should be given to that question, on the ground that, since marriage is a voluntary union for life of one man and one woman to the exclusion of all others (according to the English conception of marriage), the fact that the *Nachimson* (11) marriage was dissoluble in so cavalier and perfunctory a manner meant that it failed to satisfy the English definition. This court came to a different conclusion. In its opinion, the fact that a marriage could be dissolved easily or not easily, according to the local law of the country which had jurisdiction to dissolve it, had nothing to do with whether the marriage was validly created in the first instance.

In England it is now not difficult, in certain circumstances, to dissolve a marriage. But that fact does not alter the fundamental conception that marriage still is a union for life of one man and one woman to the exclusion of all others: the parties, when they enter into matrimony, enter into it in that state of mind. In the course of their judgments, all the judges referred to the well-known passage from Lord Brougham's opinion in *Warrender v. Warrender* (12). I will refer to a sentence from it which I take from Romer, L.J.'s judgment (13), because it is significant upon another aspect of this case. In *Warrender v. Warrender* (12) the Scottish court had to consider whether it could entertain a suit to dissolve a marriage entered into in England between a domiciled Scotsman and a domiciled Englishwoman; so it obviously has a relevance to the present case. Lord Brougham uses general terms in thus expressing his opinion. "A marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably, or sensibly, or safely, be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract." Mr. Simon to my mind was entitled to point out that the decision in

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(11) [1930] P. 217.

(13) [1930] P. 217, 236.

(12) 2 Cl. & Fin. 488, 530.

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Nachimson v. Nachimson (14) does not determine the question whether, where the form was good, if the marriage on other grounds does not satisfy the requirements of the English conception of marriage, it will be upheld in these courts. The court decided that simplicity in dissolubility does not invalidate the existence of the marriage. But if Mr. Simon is entitled to say that the English conception of marriage necessarily involves the conception of the mutual rights and obligations of consortium, and if the so-called Russian marriage denies those rights and obligations, then, as he said, it is for a domiciled Englishman no more a marriage than would be a polygamous marriage.

I have referred to *Nachimson v. Nachimson* (14) because of what Hodson, J., said. With all respect to Hodson, J., it does not seem to me that *Nachimson v. Nachimson* (14) is an answer to this point.

On the other hand, it seems to me that the argument on this part of the case places a greater emphasis than it will bear on the language of s. 9 of the code and the somewhat cryptic note of the decision of the Supreme Court of Russia.

The last sentence of s. 9, which was much pressed by Mr. Idelson and Mr. Simon, is: "A change of the place of residence of one of the spouses does not impose on the other a duty to follow the one". But that sentence immediately follows this sentence: "The order of keeping the common household is fixed by mutual agreement of the spouses". I should find it difficult to say with any confidence that the two sentences read together amount to anything substantially very different from the law of England as it is today as regards residence.

It is true that the decision referred to of the Supreme Court of Russia, if it means what the sentence in the book produced to us at first sight seems to suggest, goes a good deal further: "Marriage does not impose on the spouses a duty of living together". But what exactly does that mean? We have no evidence as to the facts of the case or any explanation of what the decision really lays down. The expert witness was only able to say, when the case was brought to his attention: "I accept the reference". I am unable to derive from that brief note a proposition anything like sufficient to support the view that this husband's marriage according to the law as laid down by the court of Russia involves so great a denial of the elementary principles of consortium as would justify this court in saying that on that ground it is no marriage at all. I therefore cannot accept the third point advanced.

As to the question of frustration, there is, I think, at first sight a considerable attraction in the argument. Whatever may

have been in the mind of any of the persons who had any part in this so-called marriage on October 16, 1945, the subsequent ban of the Soviet authorities renders it difficult to refute the proposition, as an ordinary matter of language, that this marriage has been frustrated, by which I mean that there is no possibility now of any practicable effect being given to it.

As, on another part of the case, Mr. Simon adopted as part of his own argument certain passages from the Law Quarterly Review, it may not be inapposite that I should note that in the Law Quarterly Review, Vol. 66, pp. 156, 157, in the course of a reference to this very case, the learned editor or commentator said: "Hodson, J., also held that the doctrine of frustration had "never been applied to the status of marriage as opposed to a "contract of marriage: 'to such status the doctrine of frustra- "tion has no application'. If the world continues in its present "unhappy state it may become necessary for the law to accept "such a doctrine, because, without palliating the position "assumed by the U.S.S.R., we must recognize that there are "other governments, such as the United States, who, in certain "circumstances, refuse to admit the foreign wives of their "citizens. As these marriages have been frustrated in fact, it is "arguable that they should also be held to have been frustrated "in law". I am far from saying that those sentences are more persuasive than any of Mr. Simon's arguments; but the point is obviously one of some significance today. It would be wrong, and indeed unjust to the Soviet authorities, to suppose that what they have done in this case is something the like of which is to be found nowhere else in the world.

It is unnecessary, for the reasons already indicated, that I should express any final conclusion on this matter of frustration. But, as it has been argued and as it is important, I think I should refer to Mr. Simon's argument. Its novelty, he says, is, after all, attributable to the history of our marriage law: for one thing, to the old ecclesiastical notion that marriage is a sacrament indissoluble in all circumstances; for another to the fact that the doctrine of frustration as applied in a nexus contractual or otherwise is itself a recent innovation; and he says that in any case we need not be frightened, because the doctrine, when applied to marriages, would in any case be of very limited scope and would necessarily require a condition of things in which none of the rights and obligations of the marriage was capable of continuing. So Mr. Simon formulated his case in language which I hope I have correctly noted as follows: "If", he says, "owing to the "occurrence of an irresistible and extraneous event, neither party "can thenceforward enjoy any of the rights or fulfil any of the "obligations of the marriage state, the marriage is frustrated, "and the court in the interests of common sense and justice will

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I record Mr. Simon's argument as we have had the advantage of hearing it, and it may be necessary hereafter for a court to pronounce finally on it; but I think that there are difficulties about it. I am not satisfied that a case such as *Smith v. Browne and Cooper* (15) about slaves forms a true analogy. I think that even the careful language chosen by Mr. Simon might lead to some remarkable consequences. How is the court to decide whether the event which has happened is not only extraneous but irresistible? If the doctrine is to be applied to marriages between domiciled Englishmen and foreigners, there is no reason why it should stop there and should not apply to marriages between two domiciled English persons. In the latter event, it would appear to introduce a ground for dissolution of marriage which is not found in any statute.

I now come back to the first ground which I stated, and give my reasons more precisely for concluding, as I do, that, in the light of all the facts in this case, the failure to comply with the formalities laid down in the sections of the Russian code was really more than incidental, but was essential and shows as a matter of necessary inference that the officials who were concerned in this matter did not themselves regard this marriage as being more than a casual affair, or as one in the least likely to last more than about forty-eight hours; and that it was for that reason they thought that there was no point in writing entries in the passports and reading extracts from the Russian code or asking questions whether the husband had at any time been a lunatic or previously married.

The first question (and it is on this that I form a different view from the judge) is what is the effect of s. 2 of the code which states that registration is indisputable evidence of the existence of a marriage? Hodson, J., having observed upon the absence of compliance with the statutory requirements, said (16): "This opinion" (*i.e.*, the opinion mentioned hereafter) "assuming its authoritativeness, does not to my mind assist the parties to the marriage or either of them to dispute the existence of a registered marriage, since such dispute is forbidden to them by the terms of s. 2 of the law of 1926. I hold that this section is conclusive against the argument directed against the validity of the act of registration, and it is irrelevant that the registrars omitted to perform some of the duties imposed on them by the code as a preliminary to the registration itself. The essential feature existed that prior to the registration there was, subject to the argument with which

(15) (1705) Holt K. B. 495.

(16) [1950] P. 71.

" I will deal hereafter, ' mutual consent to marry '. The registration, even if no more than a ministerial act, is conclusive " as between the parties, at any rate as to matters of form ".

With all respect to the judge, I do not accept that view: it does not seem to me to be in accordance with the evidence and the opinion expressed by the expert witness. It would, I think, be very surprising if it were so. As I have already said, there are certain essential requirements to a valid marriage in Russia. One is that the parties are not already married to somebody else. It would be obvious, I should suppose, that if, in fact, it turned out that one of the parties was already married, the appropriate proceedings could then be taken to set aside the certificate which had been given by the registrar. Also, on other grounds relative to the requirements of a valid marriage, the court, on an appropriate application, could if necessary, declare the marriage invalid notwithstanding the registration. That natural assumption seems to me to be in accordance with the evidence. The expert witness was asked this question: " I want to ask you about that " word ' indisputable '. I have before me an official publication " of the Commissar of Justice in R.S.F.S.R." and that is handed up. Then the answer given by the witness is this: " the " pronouncement comes from the first Department of the " Ministry of Justice, which department was entitled to give " comments on the law, and explanations of the law. Mr. " Idelson directs my attention to the explanation of this law " which was given by this department. Here one sees that s. 2 " of the Code of Marriage, Family and Guardianship Laws must " be understood in this sense, that the registration of a marriage " for the inscription of civil status is indisputable evidence of the " existence of the marriage, and can be upset only in a court of " law. That is the first, and the second thing is that the " department established for the drafting of the laws and the " codification of the laws states that the disputing of a registered " and of an unregistered marriage can take place in a law court " at the demand of all interested State bodies ", etc.

Then this question is put: " is it fair to sum up this authoritative interpretation of the law in this way—that a certificate " of registration is proof and indisputable proof as the law says, " and if anyone wishes to attack its validity the doors of the " court are not closed to him?"; and the expert witness answers: " That is so ". Then the judge, in reference to the question what the registrar should have done and did not do, asked this question: " You are not trying to suggest, are you, that, if the " registrar omits to ask some necessary questions, this affects " the registration and the whole thing is invalid? (A) On the " contrary—". Then the witness is interrupted, Hodson, J., saying, " I did not think it was. I suppose the same situation

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 1950 "example, supposing children marry under age without the
 "consent of their parents, once they are married it cannot be
 KENWARD "undone. (A) I go further with regard to the formalities. If
 v. "something is omitted and nobody objects, it can be rectified
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I take that evidence to mean this: the witness is supporting the opinion of the commissar (referred to by Hodson, J.), that, though for the purpose of ordinary human commerce the production of a certificate is conclusive evidence of the marriage, it does not prevent either party to the marriage or some other interested party, such as the State, going to the court and saying: "This certificate was wrongly given and must be set aside". The witness quite clearly points out that such a result would only be obtained, where certain formalities had been omitted, if the omission went to the root of the matter. That I take as the premise upon which I shall proceed, and the question is therefore briefly whether, in the circumstances of this case,—and I emphasize that phrase—the omission here was essential. Did it go to the root of the matter? At one time in the argument it was suggested that there was at any rate a discretion in this court whether we should accept the validity of a foreign marriage at all as a matter of comity; but, having regard to the passage in Lord Brougham's speech in *Warrender v. Warrender* (17), which I have already read, I do not think that it is open to this court to say that the conduct of the Soviet authorities is such that we are not compelled by comity or by any other reason to accept the validity of a marriage if it was validly effected according to the local law. It is therefore a matter of essential formality. It is agreed that the form laid down was not adhered to. It is true that on the evidence it would not have made any difference, so far as I can see, to the conduct of these two parties, if the registrar had required the husband to state whether he had ever had venereal disease; or whether there was insanity or tuberculosis in his family; or whether he had been married to somebody else, and, if so, how many children he had had. Nor would it have impressed the mind of the husband, who would not have understood a word of what was said, if the registrar had read ss. 4, 5 and 6 of the code.

I attach more importance to the question of the entry on the passport, because once that entry was made, it would be impossible for the husband, if he had been so minded, to conceal the fact that he had been married. Although the amended section requires the entry after the ceremony, still the fact that

the entry was not made is one of the points which seems to me of real significance as throwing light on the question what view the Soviet authorities were taking of this so-called marriage. They deliberately at the time forbore to do what they ought to have done, namely, to make the entry which would have made plain to the world that the husband had married the wife.

The next thing of great significance is that the evidence shows that from the start, as soon as the wife went to O.V.I.R. and made enquiry, and as soon as the husband made application through the Soviet Consulate Service, it was made quite plain that in no circumstances whatever would any facilities be given for her to join him or for him to join her. Nothing could be plainer than that. I draw the inference that that was the intention from the start. The wife had made the application to the registrar. Apparently, it was delayed until she was told that, if they came on the evening of the following day, the ceremony would be performed, that is to say, on October 16, 1945. It must have been known to the Russian authorities that the British ship would sail from Archangel on October 18. They must have realized that the sailors would then leave Russia. It seems to me quite plain from the whole nature of the proceedings that the authorities were taking the view that they could allow the parties to go through the ceremony; that its practical effect would not be a union for life; but that it would enable them to spend two nights together in Archangel.

At that time, or not very long afterwards, the law was amended, and it becomes part of the municipal law of Russia that marriages between citizens of the R.S.F.S.R. and foreigners are prohibited. That prohibition came into effect on April 1, 1947, eighteen months after this transaction. But, as it seems to me, it all has to be read together, and we can and should in this case infer that the Soviet authorities from the first took the view that marriages between British sailors and Russian girls were not marriages to which the smallest regard would thereafter be paid. If that is right, then the absence of formalities, and, particularly, the absence of any entry on the passport of the husband, has so great a significance that it goes to "the root of the matter", in the language of the expert witness. I therefore conclude that this so-called marriage was never a marriage which this court would recognize because it never conformed to the *lex loci celebrationis*. I would, therefore, allow the appeal and make a declaration according to the first prayer of the petition.

BUCKNILL, L.J. I agree that the appeal should be allowed for the reasons given by the Master of the Rolls, and I will only add a few words in deference to the trial judge from whose

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views we are differing. In the first place, it is clear that, while the English courts recognize a foreign marriage, at the same time they scrutinize such a marriage with care, especially when one of the parties is a British subject domiciled and resident in this country. It is proper in those circumstances that the court should be satisfied that all the observances laid down by the foreign state as essential to create a valid marriage have been fulfilled. In the present case, it is clear that nothing took place between the husband and the wife which would constitute a marriage according to English law. What actually happened at 9.30 p.m. on October 16, 1945, when they attended at the register office was this: There was a young woman behind the desk. No one else was present. They said: "We have come along to get married". The young woman said that she knew everything about it. She asked the husband for his British passport and his Russian passport. He handed them over. The woman then wrote out a document and wished them luck, and they went away. She did not ask the parties any questions; she did not ask either of them to sign the register; and she did not write anything on his passport.

Proceedings of such a kind do not in my opinion amount to a valid marriage according to English law, and the question arises whether it was a valid marriage according to Russian law. It is clear, I think, from the evidence of the Russian legal expert that since 1926 the Russian Government intended to tighten up the essentials of a valid marriage. They intended to do that, as he said, in the interests of the State, and in the interests of society as a whole, as well as in the interests of the parties. The code accordingly laid great stress upon registration. I think that "indisputable" does not mean indefeasible. It merely means that, *prima facie*, the document proves what is stated in it. It does not debar anyone from raising the point in a court of law that what is described as a marriage in the certificate was, in fact, not a valid marriage. For instance, the parties may have been incapable of contracting marriage. The Russian law also laid down strict rules as to what was to be done before the certificate was issued: the parties were to be questioned; very sensible questions were to be put to them, not only whether they had been married or were married or what children they had, but also whether they had ever suffered from venereal disease, or been mentally deficient, or lunatic. Not only were those questions to be asked, but the parties were to be told that it was a criminal offence not to answer them correctly. They were to sign the register, and, what seems to me also important, a copy of the register was to be made in the parties' passports so that, wherever they went, when they produced their passport it would appear whether they were married. In fact, none of those things

was done on this occasion. I think that the fulfilment of these rules and conditions is an essential requisite of a valid marriage according to Russian law. I do not think that they were unessential and that the only essential thing was that the parties before they went to the registrar should have consented to marry.

It is clear that difficulties had arisen in the mind of the young woman who presided over this office as to the question whether a British sailor could marry a Russian girl, and the matter was put off from time to time and higher authorities were consulted. In face of that difficulty which had arisen, none of those essential requisites were complied with, and the Russian Government then refused the so-called wife permission to join her husband.

The conclusion which I draw is that the Russian officials in charge of the marriage registry at Archangel did not intend that these two people should contract a valid marriage, and it is for that reason that the Russian Government is refusing to allow them any opportunity of coming together. It seems to me a strange state of things if proceedings which do not comply with the requisites of a valid marriage according to Russian law should be regarded as a valid marriage binding on this young man in England, and that he should be tied for the rest of his life to somebody whom he is unable to see by the law of Russia and who is only a wife in name: I should be sorry to have to subscribe to such a doctrine.

I think, for the reasons which the Master of the Rolls has given, that this court is justified in declaring that this was no valid marriage, and that the husband is entitled to the declaration for which he asks.

DENNING, L.J. I do not differ from the views of my brethren, but I prefer to rest my opinion on a different ground. Some of these Russian marriages may not be invalid for want of formalities, and I am prepared to assume that this marriage is not invalid on that ground. Nevertheless, I think it is voidable by our law by reason of a condition which has failed.

The English law of marriage is familiar with a condition which makes a marriage voidable. We grant a decree of nullity not only when a marriage is absolutely void from its inception, as in the case of a bigamous marriage, but also when it is only voidable for failure of some condition on which its validity depends. It may be voidable for some cause which is already existing at the date of the marriage, as when a husband has venereal disease of which he has not told his wife, or when a wife is pregnant by another man which she has not disclosed to her husband; or it may be voidable for a cause which only comes into being after the

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marriage, as when one of the parties wilfully refuses to consummate the marriage, or, after repeated efforts, turns out to be impotent.

So far as English marriages are concerned, when both the parties are domiciled here, the various conditions of validity are well known. Indeed they are for the most part prescribed by statute and we have no authority for introducing any new condition by way of frustration. So far as foreign marriages are concerned, when both the parties are domiciled in the country where they are married, we only look to the validity of the marriage by the laws of that country, and do not import additional conditions from our own jurisprudence. If it is valid there, then, even if it lacks in our eyes some of the essentials of marriage, as for instance if it is potentially polygamous, we still regard it here, for many purposes, as a valid marriage: *Baindail v. Baindail* (18).

When we come to marriages between persons domiciled in different countries, the position is different. The formal validity of the marriage is no doubt governed by the law of the place where the marriage takes place; but the substantial validity of it may depend on the personal law of one or other of the parties to it, that is, on the law of the place where he or she is domiciled. The personal law of one party may attach a fundamental condition to marriage which does not exist in the personal law of the other; and, if he marries on the basis that that fundamental condition will apply, then it will be most unjust to hold him to the marriage after the condition has been broken or has failed. It all depends on whether the parties marry on that basis or not. If they do, then it may be found that a marriage, although valid by the local law, is voidable by reason of a condition imported by the personal law of one of the parties and accepted by the other.

I can best illustrate my meaning by marriages between a woman of a monogamous domicile and a man whose domicile is polygamous, and vice versa. When an Englishwoman marries a man of a polygamous race at a register office in England intending to set up home here, the substantial validity of the marriage, as well as its formal validity, depends on the personal law of the wife, and not on the personal law of the husband. It is a condition of the marriage that it should be monogamous. Suppose that the couple afterwards change their minds and go to live in the husband's homeland and he takes to himself another wife, as he may lawfully do there: the English wife cannot sue for divorce in England. She must bring her suit in his homeland, but she cannot succeed in it because polygamy is there

permitted. Has she then no remedy? I say she clearly has a remedy in our courts. It was a condition of the marriage, imported by her personal law, and accepted by him, that the man should not take to himself another wife during the lifetime of the first. When the man took a second wife, that condition was broken and the marriage was voidable at her instance in our courts for failure of the condition.

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Now take a case where an Englishwoman domiciled here marries a man of a polygamous race in his homeland by the ceremonies of his country, intending to live with him there, well knowing that she is entering into a marriage that is potentially polygamous: the substantial validity of that marriage depends on the personal law of the husband and not on the personal law of the wife. The marriage is valid by the law of that country and is, I should have thought, valid here. There was no condition of the marriage that it should be monogamous. If he in his own country takes to himself another wife, the English wife cannot complain. She could not ask in these courts for the marriage to be avoided. So also, if she, while in England, marries a man of a polygamous race, intending to go to live with him in his homeland, knowing what marriage means in that country there would be no condition that it should be monogamous, and the marriage would not be made on that basis; and she could not complain if he there took another wife. *In re Bethell* (19) supports the view that the substantial validity of a marriage may depend on the personal law of one of the parties to it; but I am not sure that the decision itself would be the same today.

The case where a domiciled Englishman marries a woman of a polygamous race should, I think, be determined on the same principles as I have stated for the converse case. No differences of race or colour or religion entitle us to treat such a marriage on a different footing. If he marries her in her homeland by the ceremonies of her country, intending to live with her there, well knowing the kind of marriage into which he is entering, the substantial validity of the marriage, as well as its formal validity, should then depend on her personal law and not on his. The marriage is valid by the law of her country and should also for many purposes be regarded as valid here. It should not be treated as altogether invalid simply because it is potentially polygamous. If he has children by her, they should be regarded as legitimate; and if he during her lifetime, without dissolving the marriage, should come to England and go through a form of marriage here with another woman, the second marriage would be a nullity, because no one here can

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take to himself a second wife during the lifetime of the first: *Connolly v. Woolrich* (20), set out in a note to Sir Eric Beckett's valuable article in *Law Quarterly Review*, Vol. 48, p. 369, and *Baindail v. Baindail* (21).

These considerations lead me to the conclusion that a marriage may be voidable for failure of a condition imported by the personal law of one of the parties, if they married on the basis of that law. I turn therefore to this marriage in Russia between an English sailor and a Russian woman and ask myself whether there was any condition on which its validity depended? In my opinion it was a condition of the marriage that the parties should be allowed to live together. The parties intended to come to England to live, and in England the right to matrimonial consortium is an essential condition of every marriage. The sailor married his wife on the basis that that fundamental condition should apply. It was a condition of the marriage, imported by his personal law, and accepted by her. That condition has been utterly destroyed by the subsequent action of the Soviet Government. This couple spent two nights together, and since then for the last five years they have never been allowed to meet, let alone come to this country as they intended. He has not been allowed to go to her and she has not been allowed to come to him. There is no hope of their ever being allowed to meet again. An essential condition of the marriage has failed solely by the action of the Soviet Government; and for failure of that condition, the marriage is voidable in these courts. Justice requires that the sailor should be free from this illusory marriage.

I agree that the appeal should be allowed and a decree of nullity pronounced.

Appeal allowed.

Solicitors: *Boyce, Evans & Sheppard.*

B. A. B.

(20) (1867) 11 Lower Canada Jurist
197.

(21) [1946] P. 122.

In re ST. SAVIOUR'S CHURCH, WALTHAMSTOW.Court of
Archies.

Ecclesiastical law—Faculty—Number of candlesticks on Holy Table or retable—Six in use before destruction by fire—Petition supported by Parochial Church Council and unopposed—More than two candlesticks not unlawful—Discretion of diocesan chancellor.

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Although the use of two altar lights is the traditional and recognized use in the Church of England, the use of a greater number is not illegal, and it is within the discretion of a diocesan chancellor to allow the use of more than two in a proper case.

A church with nearly all its furniture was destroyed by fire in 1945. At that time there were six candlesticks on the retable, which had been used without objection since 1886 at the sung Eucharist and choral Evensong. A petition was presented for a faculty authorizing the restoration of the church and its furniture, including the six candlesticks. The petition was supported by the Parochial Church Council and was unopposed: there had been no misuse of the six candles, and the design of the new candlesticks had been approved by the Diocesan Advisory Committee.

Held, that in these circumstances a faculty for the restoration of the six candlesticks might properly be, and should be, granted.

Rector and Churchwardens of Chapel St. Mary, Suffolk v. Packard [1927] P. 289, distinguished. *In re St. Saviour's, Hampstead* [1932] P. 134, *In re The Church of the Holy Trinity, Woolwich* [1949] P. 369, and *Read v. Bishop of Lincoln* [1892] A. C. 644, considered.

APPEAL from Mr. Chancellor Linton Thorp, K.C.

On March 28, 1950, a petition was presented before Mr. Chancellor Linton Thorp, K.C., at a sitting of the consistory court for the diocese of Chelmsford by the Rev. C. W. Nye, B.A., the incumbent, and William H. Phillips and Frederick J. Darby, the churchwardens, of St. Saviour's Church, Walthamstow, Essex, for the grant of a faculty for the re-furnishing of the church with an altar table, a crucifix and six candlesticks, a communion rail, a sedilia, clergy and choir stalls, and a pulpit, at an estimated cost of 1,105*l*.

The church was built in 1874. On the east wall there had been a representation of the Crucifixion done in mosaic. Immediately in front of that a retable on which there were a small cross on a pedestal in the centre and six candlesticks, placed three on each side of the cross. Six candlesticks had been on the retable in the positions described at least from 1886 onwards. On June 6, 1945, a fire occurred at the church and only the south aisle and a chapel in it remained fit for further use. The desire of the petitioners was stated to be to restore the church to its former state.

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The proposed new altar was dedicated by the Bishop of Chelmsford in January, 1950, as were also the six candlesticks and the crucifix now in question, all of which were placed on the altar only for the purpose of being dedicated. The petition was unopposed.

The chancellor, refusing a faculty for the use of six candlesticks on the Holy Table or retable, held that, in the light of history and on the authorities, the use of more than two was unlawful.

The petitioners appealed.

Geoffrey Hutchinson, K.C., Humphrey King and Michael Chavasse for the petitioners. It seems from the judgment of the chancellor that his objection to the use of six candlesticks is only directed against the use of candles, and the lighting of them, when put to a ceremonial purpose. In *St. Andrews, Haverstock Hill* (1), Dr. Tristram, the chancellor of London, seems to have had no objection to the use of six candlesticks. In the Consistory Court of London, Mr. Chancellor Errington heard a petition in *In re St. Saviour's, Hampstead* (2), for the removal of four of six candlesticks for which no faculty had issued, and he confirmed the placing of two candlesticks on the retable, but did not order the removal of the four. Mr. Chancellor Linton Thorp, in the present case, seems to have thought that Mr. Chancellor Errington had refused a faculty. *Rector and Churchwardens of Chapel St. Mary, Suffolk v. Packard* (3), must not be treated as an authoritative decision binding on this court: it concerned the question of ceremonial use. Unless candlesticks are used for ceremonial purposes they are merely articles of furniture, and there is no reason why a faculty for them to be placed upon the Holy Table or upon a retable should not be granted. There is no evidence here that the six candlesticks are to be used ceremonially. This appeal ought to be allowed, and the faculty granted by the chancellor for the use of only two candlesticks should be amended to permit the use of six.

Cur. adv. vult.

August 22. SIR PHILIP WILBRAHAM-BAKER-WILBRAHAM, Dean of Arches, reading his judgment, stated the facts and continued:—The petition was heard by the chancellor on March 28, 1950, and he gave judgment on May 11, authorizing the introduction of all the articles prayed for except four of the six candlesticks. He allowed the crucifix on the ground that the mosaic representing the Crucifixion had been damaged beyond

(1) (1909) 25 T. L. R. 408.

(3) [1927] P. 289.

(2) [1932] P. 134.

repair, and that the crucifix would "represent so far as possible" today some continuity in the appearance of the Church". But he did not feel able to apply the same principle to the six candlesticks. After a review of the authorities he felt compelled to hold that the use of more than two lights upon the Holy Table or upon a retable is unlawful, and that accordingly a faculty to place six candlesticks upon the Holy Table must be refused.

On the hearing of the appeal it was argued that unless the candlesticks were used ceremonially they were merely articles of church furniture like flower vases or banners; and that it was the use to which an ornament was put which rendered it lawful or unlawful.

Before I come to the authorities, there are two matters to which I ought to draw attention. First, in the course of his judgment the chancellor referred to the presence in this church of certain other articles, including two statues of the Blessed Virgin Mary, and pictures representing the Stations of the Cross, in respect of which no faculty could then be produced. He pointed out that the Blessed Sacrament was reserved in the side chapel, that a sanctus bell was used at the time of the consecration, and that on Fridays in Lent a short service with an address was held at each of the fourteen Stations of the Cross. He was careful to make it clear that he did not express directly or by implication either approval or disapproval of these ornaments or of their use. Those issues were not before the court. Nevertheless he conceded that the evidence as to the Stations of the Cross, the sanctus bell, the statues of the Virgin Mary, and the services on Fridays in Lent had led him to apprehend with some anxiety the possibility of a ceremonial use being made of the candlesticks.

Since the hearing in the court below, three faculties have been discovered and produced, namely (a) a faculty granted in 1926 for the renovation of the side chapel, which included the placing of an aumbry in the south wall thereof. This was said to be "for the reservation of the Blessed Sacrament for the sick"; (b) a faculty granted in 1934 to beautify the side chapel which was then referred to as the Lady Chapel—by erecting oak screens and otherwise; and (c) a faculty granted in 1940 authorizing the erection of a small statue of the Madonna and Child in the Lady Chapel. Although these faculties do not cover all the matters mentioned in the chancellor's judgment, they do at any rate show that some attention has been paid to legal requirements.

Secondly, on the hearing of the appeal new evidence was produced in the shape of an affidavit by the Rev. Harold Riley, Secretary of the Church Union, who had, in view of the conflicting decisions, been collecting information as complete as possible as to the number of parish churches in the Province of

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Canterbury which, in fact, have more than two candles on or behind their principal Holy Tables. For this purpose he had sent a questionnaire to a priest in every rural deanery in the Province.

The replies from the diocese of Chelmsford covered twenty-seven of the twenty-nine rural deaneries in that diocese; they referred to 287 parish churches, and stated that in eighty-eight of those churches there were more than two candles on or behind the principal Holy Table. To take the Province of Canterbury as a whole, replies had been received concerning 3,913 churches, and of these 1,013 were stated to have more than two candles on or behind the principal Holy Table. The value of evidence of this kind is doubtless open to question, since a practice is not necessarily legal because it is widespread. Nevertheless, I do not think that this evidence can be completely disregarded.

Coming now to the authorities, I need not consider in detail the earlier ritual cases of the nineteenth century, since they were concerned not so much with the number of altar lights permissible (although I think it may be assumed that the number was generally two) as with the legality of having any altar lights at all. Before *Read v. Bishop of Lincoln* (4), it seems to have been established as settled law that the mere use of lighted candles upon the Holy Table, when not needed for the purpose of giving light, was unlawful. Since that decision the whole situation has been altered, not so much by the actual decision in that case (which in itself was hardly conclusive) as by the extremely full and learned judgment of Archbishop Benson (5), and Lord Halsbury's judgment in the Privy Council (6), advising that the appeal should be dismissed. Since that time it has become the common practice to allow two lighted candles upon or behind the Holy Table, provided that they are not used ceremonially; and the mere fact that they are kept lighted during the service of Holy Communion is not regarded as a ceremonial use.

The question of the number of lights allowable is a different one, upon which the authorities are not conclusive. In *St. Andrews, Haverstock Hill* (7), the chancellor of London in 1909 dismissed a petition for the removal of four out of six candlesticks which had been placed in the church without a faculty, and granted a confirmatory faculty for the use of all six. This was a strong decision, but the reasons which led Dr. Tristram to make it are not obvious from his judgment as reported.

More important is *Rector and Churchwardens of Chapel St. Mary, Suffolk v. Packard* (8), which was decided in this court by

(4) [1891] P. 9; [1892] A. C. 644.

(5) [1891] P. 19.

(6) [1892] A. C. 644, 652.

(7) (1909) 25 T. L. R. 408.

(8) [1927] P. 289.

my predecessor Sir Lewis Dibdin. There a faculty was issued for the removal of four out of six candlesticks upon a retable. It was argued before me that the point was not really decided, since counsel for the appellants did not press for the retention of all six, and the case therefore went by default. The reasons why this line was taken are not clearly apparent, and *St. Andrews, Haverstock Hill* (9), does not seem to have been referred to. It is clear however that in the *Capel St. Mary* case (8) there had been much ceremonial use of lighted candles which could not be justified. I am unable to treat that case as a clear decision that the use of six candles is necessarily illegal in all cases.

This was followed in 1932 by *In re St. Saviour's, Hampstead* (10), in which the vicar of the parish had introduced without faculty six candlesticks upon a retable behind the Holy Table. The chancellor of London, Mr. Errington, confirmed the placing of two candlesticks on the retable, and added "I will not require the removal of the other four from the church provided I have a satisfactory undertaking by" [the incumbent] "as to their use". Whether any such undertaking was given, and if so what was its nature, I do not know.

Finally, in the recent case of *The Church of the Holy Trinity, Woolwich* (11), the chancellor of Southwark, Mr. E. Garth Moore, granted a faculty for six candlesticks in place of two which were to be removed, subject to the direction that, until further order, not more than two of the lights should be upon the altar at the same time. He added, "The petitioners should in due time approach the bishop and discuss the number with him. I am prepared to leave the decision as to the number of lights at any given moment to the direction of the ordinary". In coming to this decision the chancellor of Southwark felt himself free to express his own view in the light of modern scholastic research. He was not bound by *St. Saviour's, Hampstead* (12), which was decided in another diocese, and he did not feel himself bound by the *Capel St. Mary* case (13), because there no argument had been put forward in favour of retaining six candles.

In the present case the chancellor in the court below found it impossible to reconcile the decision of Mr. Chancellor Errington in *St. Saviour's, Hampstead* (12), with that of Mr. Chancellor Garth Moore in *Holy Trinity, Woolwich* (14). I am not sure that the gulf between these two decisions is quite as wide as he supposed; but certainly there is a discrepancy.

The question which I have to decide is simply one of legality; and unfortunately I have not had the advantage of hearing

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(9) 25 T. L. R. 408.

(10) [1932] P. 134.

(11) [1949] P. 369.

(12) [1932] P. 134.

(13) [1927] P. 289.

(14) [1949] P. 369.

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argument on both sides of the question. But after careful consideration I have come to the conclusion that, although the use of two altar lights must be regarded as the traditional and recognized use in the Church of England, I cannot hold that the use of more than two is necessarily illegal. The two lights are there "for the signification that Christ is the very true Light of "the World"; and I have not been able to discover that the use of more than two lights on or behind the Holy Table has any other significance. They are lit on the more important occasions to give greater dignity to the service.

On this point I questioned the vicar. He had been incumbent of St. Saviour's, Walthamstow, from December, 1942. Six candlesticks were then upon a retable behind the altar, and remained so until the fire in 1945. They were used at the sung Eucharist, being lit before and extinguished after the service. They were also used at choral Evensong, but then they were extinguished after the third collect. If six new candlesticks were now authorized, they would be used in exactly the same way. He attached no special significance to six lights (instead of two) except that they emphasized the more important services, and gave an additional dignity to them.

I cannot think, therefore, that there is any danger of misuse of the six candlesticks in the present case. And, that being so, I think that they ought to be allowed. For the circumstances of the case are special: six candlesticks have been used in this church, if not from the time of its consecration, at any rate from 1886 until the fire in 1945, a period of nearly sixty years. Had it been possible to save the six old candlesticks from the fire, they would doubtless have been replaced without question. I cannot see that the fact that these are new and different candlesticks makes any great difference: for all practical purposes the result is mere replacement. The petition is unopposed; it has the support of the Parochial Church Council; and the designs have been approved by the Diocesan Advisory Committee. In these circumstances I think that the faculty should be amended so as to include all six candlesticks.

I should be sorry if this decision were construed as encouraging the use of more than two lights on or behind the Holy Table. As I have already indicated, I think the use of two lights is the recognized use in English churches, and it seems to date back to very early days. All that my decision involves is that it is within the discretion of a diocesan chancellor, in any proper case, to allow more than two. But this is a discretion which ought to be exercised with great care. "All presumption", as Lord Penzance once said (*Peek v. Trower* (15)) "is to be made in

"favour of things as they stand"; and this is especially so where there is opposition, or any evidence of dissatisfaction. If I may borrow the words of Archbishop Benson in *Read v. Bishop of Lincoln* (16), "where that is the case, even in a small degree, "charity and good sense ought not to be violated".

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Appeal allowed.

Solicitors: *Trollope & Winckworth.*

H. G.

(16) [1891] P. 88.

THOMAS (JOSEPH) *v.* CUNARD WHITE STAR, LD.
THE QUEEN MARY.

1950
Nov. 2.

Willmer, J.

Shipping—Collision—Loss of life—Damages—Costs—Taxation—Award in respect of loss of expectation of life resulting in increase in value of estate—Consequent additional costs of administration—Whether allowable—R. S. C., Ord. 65, r. 27 (29).

As a result of a decision of the House of Lords, holding that the Cunard White Star liner Queen Mary was partly to blame for a collision between that vessel and H.M.S. Curacoa, the plaintiff, suing as the administrator of the estate of a seaman on board the Curacoa, who lost his life in the collision and died intestate, obtained judgment, with costs, against the owners of the Queen Mary and was awarded a sum in respect of loss of expectation of life of the intestate under the Law Reform (Miscellaneous Provisions) Act, 1934. The value of the estate which, before the award, was negligible, was so substantially increased by the award that the administrator incurred additional corrective expenses and costs of administration after the judgment.

Held, that the administrator was not entitled, on taxation of costs, to be allowed the additional costs and expenses of administration made necessary by the increase in value of the estate by the amount of the award, for that expenditure was incurred after the plaintiff had successfully prosecuted his action to judgment, and was in no sense necessary to enable him to achieve that end.

Smith v. Buller (1875) L. R. 19 Eq. 473, 475, followed.

SUMMONS by way of appeal to the judge in chambers in objection to a registrar's report. (The summons was adjourned into court for judgment.)

The plaintiff was the administrator of the estate of a seaman who lost his life as a result of a collision between the Cunard

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liner Queen Mary and H.M.S. Curacoa, for which collision the Queen Mary was held partly to blame. The plaintiff recovered judgment for damages and costs in respect of the death of the deceased under the Law Reform (Miscellaneous Provisions) Act, 1934, and the damages recovered were solely for the benefit of the estate of the deceased. Apart from the damages recovered in the action, the estate was so small that no grant of administration would have been required. A grant of administration was, however, obtained by the plaintiff in 1945, solely for the purpose of enabling the present action to be brought. The expenses incurred thereby were included in the plaintiff's bill of costs on taxation, and were duly allowed by the registrar as being costs necessarily incurred for the prosecution of the action. As a result of the damages recovered under the Law Reform (Miscellaneous Provisions) Act, 1934, the estate of the deceased was very materially increased in value, and it became necessary for the plaintiff, as administrator of the estate, to file a corrective affidavit; and certain further expenses were necessarily and properly incurred in connexion with the administration of the estate. Those further expenses were disallowed by the registrar, and the plaintiff took out this summons before a judge in chambers in objection to the report of the registrar in respect of the disallowance.

P. Bucknill for the plaintiffs.

S. O. Olson for the defendants.

The arguments of counsel were heard in chambers.

WILLMER, J. [after stating the facts]:—According to the registrar's answers to the objections, the disallowance of the items in question is in accordance with the uniform practice both of the taxing masters of the Supreme Court and of the Admiralty Division. No authority to the contrary was brought to my attention, and no reported case was cited in which expenses of this character have been allowed as part of the costs of an action brought by an administrator in similar circumstances, although since the Act of 1934 came into force there must have been very many cases in which similar expenses had to be incurred.

Notwithstanding the uniform practice to the contrary, however, it is contended on behalf of the plaintiff that in this and similar cases the additional administration expenses incidental to the increase in value of the estate ought to be allowed as part of the costs of an action brought by the administrator against the wrongdoer who caused the death. It is pointed out that it is normal practice, in cases like the present, for the administrator to be required, on taking out the grant, to give an undertaking

to file a corrective affidavit in the event of damages being recovered for the benefit of the estate. Although I am informed that in the present case no such undertaking was in fact required to be given by the plaintiff, it is contended that he ought to be put in the same position as if such an undertaking had been given at the time of taking out the grant. On this basis it is argued that the expenses incurred after judgment in connexion with the increased value of the estate ought to be counted as part of the expenses of obtaining the grant, and, as such, to be allowed as costs properly incurred for the purposes of prosecuting the action.

Both sides referred to *Feay v. Barnwell* (1), but it appears to me that that decision has very little relevance to the question now under consideration. That case is authority for the proposition that, in assessing the amount by which an award of damages under the Fatal Accidents Acts ought to be reduced where damages are also awarded under the Law Reform (Miscellaneous Provisions) Act, 1934, regard may properly be had to the administration expenses which must necessarily be incurred in connexion with the estate of the deceased. No suggestion was made in that case that expenses of the kind here in question could be treated as part of the costs of the action.

In my judgment it is impossible to ignore the fact that the expenses here in question were incurred after the plaintiff had successfully prosecuted his action to judgment, and were in no sense necessary for the purpose of enabling him to obtain that judgment. It appears to me to be quite impossible notionally to ante-date these expenses and to treat them as part of the expenses of obtaining the grant, which they clearly are not. To do so would, in my view, be quite contrary to R. S. C., Ord. 65, r. 27(29) (2).

It was laid down by Malins, V.-C., in *Smith v. Buller* (3) that "the costs chargeable under a taxation as between party and party are all that are necessary to enable the adverse party to conduct the litigation, and no more". The costs here sought to be included were in no wise necessary to enable the plaintiff to conduct the litigation: they were incurred after

(1) [1938] 1 All E. R. 31.

(2) R. S. C., Ord. 65, r. 27 (29):

"On every taxation the taxing master shall allow all such costs, charges and expenses, as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the

"same no costs shall be allowed

"which appear to the taxing master

"to have been incurred or increased

"through over-caution, negligence or

"mistake or by payment of special

"fees to counsel or special charges

"to witnesses or other persons, or

"by other unusual expenses".

(3) (1875) L. R. 19 Eq. 473, 475.

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the litigation was over, so as to enable the estate, increased in value as it was as the result of the litigation, to be properly administered. But the defendants had no concern with that, any more than they would have had if expenses had to be subsequently incurred in consequence of disputes arising between rival claimants over the distribution of assets.

In my judgment the registrar, in disallowing these costs, came to the correct conclusion, and I accordingly dismiss the plaintiff's objection.

Objection disallowed.

Solicitors: *Botterell & Roche; Hill, Dickinson & Co.*

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Nov. 6.Singleton and
Birkett, LJJ

Husband and wife—Divorce—Husband's petition—Cross-petition by wife—Security for wife's costs—Wife a certified "poor person"—Practice of Divorce Division—Whether affected by Legal Aid and Advice Act, 1949 (12 & 13 Geo. 6, c. 51).

The Legal Aid and Advice Act, 1949, and the regulations made under it, do not limit the right of a wife, whether petitioner or respondent, in divorce proceedings, to apply for and be granted an order against her husband for security for her costs.

Where a wife has been granted a certificate under the Poor Persons Rules and has contributed by direction, a sum of not more than 10l. towards the costs, and, on the coming into force of the Act of 1949, becomes an "assisted person", the registrar, on a summons for security for the wife's costs, is not bound by the limit of the wife's fixed contribution as a poor person; but, having considered all the facts, may in his discretion, order such security as he thinks right.

APPEAL from Collingwood, J.

Application for leave to extend the time for appealing against refusal to order security for wife's costs.

The husband, Peter Wigley, on July 9, 1949, petitioned for divorce from his wife on the ground of her alleged adultery. On November 24 an answer was filed by the wife, who denied adultery and cross-petitioned, charging the husband with cruelty. The co-respondent named in the husband's petition entered an appearance but did not file an answer. Between the date of the petition and the date of her answer the wife obtained a certificate entitling her to defend the petition as a poor person and when

the Legal Aid and Advice Act, 1949, came into operation she became an "assisted person" under that Act. The maximum contribution to costs payable by the wife as an assisted person was 10*l.*, and she had in fact contributed 5*l.* The case was set down for hearing on July 12, 1950. On July 26 an application was made to the registrar at Southampton on behalf of the wife, for an order for security for her costs. That application was refused by the registrar, who had been informed that the husband had already paid to the wife a sum of 9*l.* That sum was a half-share of certain assets jointly owned by the parties, which had been sold. The order of the registrar was in the following terms: "Upon hearing the solicitors for the petitioner and the respondent, and the respondent having received 9*l.* from the petitioner on December 2, 1949, it is ordered that there be no "order for security for costs herein". On August 16 the solicitor for the wife applied *ex parte* to the registrar and pointed out that there had been some misunderstanding with regard to the payment of 9*l.* by the husband. The registrar, while disclaiming personal jurisdiction, pointed out that the wife had a right of appeal to a judge in chambers. By that date the time for appealing had expired.

On October 5 application was made to Collingwood, J., in chambers, to extend the time for appealing. The learned judge refused the application, but gave leave to appeal from that refusal. The wife now appealed.

The court extended the time for appealing and heard the appeal.

David Henderson for the wife.

Norman Brodrick for the husband.

SINGLETON, L.J., stated the facts and continued: In my view the judge ought to have extended the time for appealing. There had been no waste of time on the part of the wife's solicitors; they had put the facts as they knew them before the registrar at Southampton in the first instance; they had caused their Southampton agent to go before the registrar again when the facts were established; and they had adopted the advice of the registrar in seeking leave to appeal notwithstanding the fact that time had expired. In those circumstances I think that time ought to have been extended, so that the appeal could have been heard on its merits by Collingwood, J. In the result we have had to consider this case without the advantage of knowing what view the judge took upon the various sections of the new Act and upon the regulations made thereunder. It is always an advantage to this court to have the view of one of experience in the practice

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of the Divorce Court when a matter arising therefrom is being considered.

The circumstances are a little peculiar. Under the old practice the wife was entitled to apply for security for her costs whether she was respondent or petitioner. Two passages may be quoted from Rayden on Divorce (5th ed.), pp. 278, 280: First, "the registrar or taxing officer, having ascertained what is a sufficient sum of money to be paid into court or what is a sufficient security to be given by the husband to cover the wife's costs of the suit, may thereupon issue an order upon the husband . . . to pay into court or secure such costs, within a time to be fixed". Secondly, "The wife is not given security as a matter of course, and the registrar or taxing officer may, after having taken all the circumstances into account, including the means of the husband and wife, fix the security to cover either all or part of the wife's costs of the suit or may make no order for security at all".

Those two passages are based on r. 74 (3) of the Matrimonial Causes Rules, 1947, which provides: "Where an application for security has been made under this Rule, the Registrar or Taxing Officer shall ascertain what is a sufficient sum of money to cover the costs of the wife, and if, after taking all the circumstances into account, including the means of the husband and the wife, he considers that the husband should provide security for all or some of the wife's costs, he may order the husband to pay the sum so ascertained, or some portion of it, into court or to give security therefor within such time as he may fix, and may direct a stay of the proceedings until such order is complied with".

That rule is really stating what had been the practice in divorce for many years. That practice continued unaffected, except perhaps as to amount, when the poor persons' procedure was set up. Even though one party or the other, or both parties, had been admitted as poor persons, an order could be made for security for the wife's costs.

This applicant, the wife, had been admitted as a poor person, and her application for security for costs was made when she was in fact a poor person. If she had continued under the Poor Persons Rules the practice would have been just the same, but it is said that by the coming into operation of the Legal Aid and Advice Act, 1949, on October 2 of this year the whole position is changed.

I would first observe that as the registrar declined to make an order at a time when the applicant was a poor person, and as the appeal which we have heard is against that decision of the registrar, *prima facie* it would appear that we ought not, if disposed to make an order, to make one for a sum greater than

would have been the case if she had remained a poor person and had not become an assisted person under the Act of 1949.

Mr. Brodrick, on behalf of the husband, put forward three main submissions to this court. The first was that a wife, being an assisted person under the Act of 1949 but one in respect of whom the maximum contribution payable is not more than 10*l.*, is not entitled to an order for security against her husband. His second point was that, assuming that she can obtain an order for security, the order must be limited to the sum of 10*l.* mentioned in reg. 5 (10) of the regulations made under the Act, or, alternatively, that she ought not to be given a greater sum by way of security than she would have obtained if she had remained a poor person. His third submission was that in any event there ought to be no order in this case, having regard to all the facts.

Having considered many sections of the Act and been referred to a number of the regulations made under it, I find nothing in Act or regulations which forces me to say that the long-standing practice under which an order for security for the wife's costs has been made has been altered. Section 12 of the Act, which gives the Lord Chancellor power to make regulations, seems to point to the fact that the power to order security for costs remains. I take that from s. 12, sub-s. 2, which reads: "Without prejudice to the foregoing subsection or any other provision of this Act authorizing the making of regulations, regulations may . . . (b) regulate the procedure of any court or tribunal in relation to legal aid, and in particular make provision . . . (ii) as to the cases in which and extent to which a person receiving legal aid may be required to give security for costs, and the manner in which it may be given".

This appeal may be the forerunner of others, indeed it may be that the position will have to be considered on an application for security for costs when both parties to a suit are assisted persons. We were told that no regulations have so far been made under s. 12, sub-s. 2 (b) (ii). I am inclined to think that it will make the task of registrars, taxing officers and may be of judges, more simple if that is taken in hand.

In connexion with the question whether a person is to be allowed to be an assisted person or not and on what terms, the Act contains a number of provisions. By s. 2, sub-s. 1: "Subject to this Part of this Act, legal aid shall be available for any person whose disposable income does not exceed four hundred and twenty pounds a year", and there are various provisions under which a person receives legal aid. For instance, s. 2, sub-s. 2 (c), provides that "he may be required to make a contribution to the legal aid fund in respect of the sums payable thereout on his account". Section 3 concerns contributions

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from assisted persons and provides by sub-s. 4 that there may be a charge on property recovered. Section 4 contains important provisions as to assessment of disposable capital and income and of maximum contribution. Section 4, sub-s. 6, provides: "Subject to the provisions of this section, a person's disposable income and disposable capital, and the maximum amount of his contribution to the legal aid fund in respect of any proceedings, shall be determined by the National Assistance Board, and the board may call attention to any special circumstances affecting the maximum amount of the lump sum and periodical payments which he could reasonably make on account of any contribution". I suppose that the local committee refer the matter to the National Assistance Board; and I assume that in such a case that board decide the maximum amount of his contribution to the Legal Aid Fund in respect of any proceedings; and if thereafter the local committee order the maximum to be paid to the Legal Aid Fund, the conditions are fulfilled under which a person may be an assisted person under the Act.

But, if that assisted person is a husband, and the suit is a matrimonial suit, it may be that thereafter an application comes for security for the wife's costs. It is with that sort of case in mind that I think it might be as well if regulations under s. 12, sub-s. 2 (b) (ii), were made. Otherwise, someone will be faced with the task of deciding what is to be done in regard to the wife's application for security for costs when, with the help of the National Assistance Board, the local committee have already decided that the husband shall make the maximum payment which he can make to the Legal Aid Fund. There may be an overlapping and it will be extraordinarily difficult for anyone to say what shall be done unless further guidance be given on that matter. But with that we are not concerned in this case, as the applicant was a poor person who has now become an assisted person, while the husband has not applied to be admitted as an assisted person, though he may do so at some time when he has to pay the costs of the proceedings that have taken place so far, and of others that may follow. However, the husband has not yet taken that step and consequently we in this court have to consider this appeal as one in which the wife alone, the applicant, is an assisted person.

As I have said, I do not find anything in the Act, or in the regulations made under the Act, to show that the old practice under which the wife may apply for and obtain an order for security for costs in a matrimonial suit has been altered. Therefore it seems to me that the first submission of Mr. Brodrick in opposition to this application fails.

The second submission is based on reg. 5 (10), (1). That regulation, read with the proviso, presupposes a case in which the wife cannot find 10*l.*, and the local committee come to the conclusion that the husband cannot pay enough to render a joint contribution of 10*l.* possible. In those circumstances there is the provision for a salaried solicitor employed by the Law Society to act for the wife.

It is submitted that when that has been done, and the solicitor acting is a salaried solicitor employed by the Law Society, no portion of the solicitor's costs can be recovered. Mr. Henderson says that there are other costs and disbursements which are incurred, and consequently there is no reason why there should not be an application for security for costs generally to cover those matters. Mr. Brodrick replied that the proviso to reg. 5 (10) presupposes that together the two cannot raise more than 10*l.*, and therefore there ought not to be any greater security for costs ordered than the sum of 10*l.* He submitted, in the alternative, that no more costs ought to be ordered in a case of this kind than would have been ordered had the applicant remained under the Poor Persons Rules, and in such case, she having deposited 5*l.* for disbursements already, it is unlikely (both learned counsel said) that more than 5*l.* or 10*l.* would be ordered as security, according to the practice in the Divorce Division when poor persons cases were taken.

I do not think that reg. 5 (10) has the effect of imposing a requirement that if a wife is given security for her costs they shall be limited to 10*l.* The proviso to reg. 5 (10) states: "Provided that this paragraph shall not apply where the applicant is a wife and it appears to the local committee that the husband might reasonably be expected, if ordered to do so, to provide such security for her costs as would, with her contribution, if any, amount to more than ten pounds". The local committee are assumed to have considered that question, and to have come to a decision, but they may not have had full information before them. If, thereafter, there is a summons before the

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(1) Legal Aid and Advice Regulations, 1950, No. 1359, reg. 5 (10):
 "Where an application relates to a matrimonial cause and the maximum contribution payable by the applicant is not more than ten pounds, the Local Committee shall inform the applicant that if he accepts the terms upon which they are prepared to issue a certificate they will arrange for the case to be conducted, in accordance with s. 6, sub-s. 7 of the Act, by a

solicitor employed by The Law Society for a salary to act in connexion with matrimonial causes:
 "Provided that this paragraph shall not apply where the applicant is a wife and it appears to the Local Committee that the husband might reasonably be expected, if ordered to do so, to provide such security for her costs as would, with her contribution, if any, amount to more than ten pounds".

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registrar to ask for security for the wife's costs it is, I think, open to the registrar to consider all the facts and, if it appears to him within the general principles adopted and applied for so long, right to make an order for more than 10*l.*, then it is open to him to do so. In other words I do not think that he is bound by the limits arrived at by the local committee on such information as was before them when they considered the question at an earlier stage. That, I think, disposes of the second point raised by Mr. Brodrick.

The third submission of Mr. Brodrick was that in any event an order ought not to be made having regard to all the circumstances of this case. It is obvious that there is not much money on either side. The wife was admitted to defend the suit as a poor person and she is now an assisted person. The husband is a labourer earning some pounds a week. The order of the registrar is in these terms, and this court ought to consider itself as bound by them: "Upon hearing the solicitors for the petitioner and the respondent and the respondent having received 9*l.* from the petitioner on the 2nd December, 1949, it is ordered that there be no order for security for costs herein".

There is nothing on the face of that order to show that the registrar was told that the 9*l.* had been received as security for costs. Indeed, as Birkett, L.J., said in the course of the argument, it would seem likely that if that had taken place and if that was the reason for the registrar's refusing to order security, he would have said so. The more natural inference to be drawn from the order is that the registrar, having weighed up all the circumstances and having considered the terms of r. 74 (3) of the Matrimonial Causes Rules, 1947, came to the conclusion that this was not a case in which he should make an order.

The wife had been admitted as a poor person in October, 1949. In December, 1949, she received the sum of 9*l.* from her husband, or from his solicitors. In those circumstances, under Ord. XVI, r. 31 (1), if a poor person has been granted a certificate as such, and thereafter the poor person becomes possessed of means beyond those stated in the certificate, it is the duty of the poor person to tell his or her solicitor, and it is the duty of the solicitor to report it to the committee. That was the position under the rule in regard to poor persons. It may well be that the registrar took the view that it was the duty of the poor person to report the position, and that if the poor person had done so the poor person's certificate might have been withdrawn or cancelled. The registrar may therefore well have thought that this was not a case in which he ought to make an order for security for the wife's costs because she had not communicated to the Poor Persons' Committee or her solicitors what the true position ultimately became.

Moreover, the registrar, considering all the circumstances, considering that the wife was a poor person and defending and taking cross-proceedings as such, and considering that the property of the husband and wife had been equally divided between them after the poor person's certificate was secured by the wife, may well have thought that the making of an order for security for the wife's costs would do no one any good. She had a poor person's certificate and it was probable that she would shortly become an assisted person, whereas if he made an order for security for her costs, she having received the 91*l.*, the only result might be that the husband would not be able to continue as an ordinary litigant. If that was the view of the registrar it is quite impossible for anyone to say it was wrong. The result of applications of this kind may well be that instead of having one assisted person in a suit there will be two, and if that is the result it is so much the worse for the legal aid fund and for the taxpayer. Perhaps that is not a consideration for this court, but I am bound to say, from what I have seen of these matters in the last few weeks, that I am rather appalled at the number of assisted persons there are, and are likely to be.

I have every sympathy with the person who desires legal assistance, and I am quite sure that members of both branches of the legal profession will carry out the terms of the Act of Parliament, and the regulations made under it, to the best of their ability; but I would express the hope that it will not mean the disappearance of the ordinary litigant.

I think that the appeal must be dismissed; the order appealed from being right, even though it would have been better if the judge had extended the time for appeal.

BIRKETT, L.J. I agree. I share my Lord's regret that we did not have any judgment, or any discussion, in the court below of the very important matters which have been argued before us here today. I have come to a clear conclusion on these matters, and agree with the result announced by my Lord. The wife was served with a petition on July 9, 1949, alleging adultery on her part, to which she made answer that she was not guilty of adultery and cross-petitioned for divorce on the ground of cruelty. Thereupon on October 18, 1949, she successfully applied to the appropriate committee and obtained a certificate under the then Poor Persons Rules.

We are told that she was obliged to make and did make a contribution of 5*l.* towards the costs of the suit, that being a sum which is apparently assessed in almost every case before the certificate is granted. On July 26, 1950, the wife being, and the husband not being, a poor person, she made an application to the registrar for security for her costs, which was refused. It

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may be that there was a misunderstanding about what the actual position was at that time. A sum of 91l. had certainly been paid to the wife by the husband. Whether it was paid by way of security for costs, or for some other purpose, does not seem to me greatly to matter. The important fact is that before the registrar was the payment of 91l. It appeared subsequently from a letter of July 31, 1950, to the solicitor acting for the wife, that the 91l. had been paid in settlement of disputes between the husband and wife about certain property and certain moneys in a joint account. In consequence of that information a further appearance was made before the registrar in August, 1950, and he suggested that this was a matter which should go before the judge. Accordingly, in due course it came before Collingwood, J. It was submitted to the judge first that the summons was out of time, as it clearly was, and that the time for appealing ought not to be extended. It was also submitted that a legally assisted person, as the applicant wife had then become, ought not to get security for costs.

Collingwood, J., decided that he would not extend the time, and the appeal to him failed on that ground only. I agree with my Lord that, in the circumstances as we now know them, the judge ought to have extended the time, and gone on to hear this matter argued before him. I regret that we have not had the advantage of a judgment or the reasons for the decision given by the judge.

There appears to be no doubt at all that the wife who was a poor person became an assisted person under the Legal Aid and Advice Act, 1949. By s. 17, sub-s. 3, it is plain, the poor person who had a certificate in being on October 2, 1950, thereafter became an assisted person. The case therefore comes before us today with the wife an assisted person and the husband not. In those circumstances Mr. Henderson, for the wife, has argued that she is entitled to appeal against the judgment of Collingwood, J., on the two points, the first of which is that he was wrong in not extending the time. It was further submitted (a) that she was entitled to an order for security for costs, and (b) that she was not limited in any way in making that application by anything that appeared either in the regulations or in the Act.

The position of this wife was that of many applicants. Her maximum contribution did not exceed 10l. Her case was a matrimonial cause. In those circumstances, the case was conducted by a solicitor employed by the Law Society's Divorce Department. That meant that the fees were on a low fixed scale. But it is quite plain that where the assisted person is a wife, and it appears that the husband might reasonably be expected and ordered to provide security for her costs in such an

amount as that, with her contribution, would be more than 10*l.*, it would be a case not for the solicitor in the Law Society's Divorce Department but for the ordinary panel of solicitors assigned to all assisted persons. Mr. Henderson thereupon argues that the wife is not bound, in her application for security, merely because she is in that position, to be limited to 10*l.*, but that the court has a discretion to consider all the circumstances and to fix such amount as it thinks fit.

Mr. Brodrick, for the husband, on the other hand, argued that after the coming into force of the Legal Aid and Advice Act, 1949, the whole basis of the matter was changed, in view of the aid now for the first time being given in this type of case. He submitted first that the theory on which the order for security for costs had formerly been made now no longer had any application, referring to various sections. He then argued that if he was wrong on that, and if we decided that it is still open to an assisted person to obtain an order for security for costs, then the second matter is how it is to be dealt with. His submission on that was that, having regard to the special position of this applicant wife (that is what I would call the under 10*l.* position) security for costs against the husband must necessarily be limited to that amount; or, alternatively, it would be such an amount as would be payable under the Poor Persons Rules as though there had been no change.

The relevant rule is set out in Rayden on Divorce (5th ed.), p. 281: "A wife suing as a 'Poor Person' or whose husband is 'so suing, can obtain an order for security for the out of pocket 'costs of the hearing'. It was conceded, of course, that a poor person can always come to the court and ask for security for costs. It is said now that the wife's status has been improved as she is an assisted person, no longer a poor person; and that the Act has taken that right away from her. Mr. Brodrick argued that when the court did assess the amount, if it felt that the wife was entitled to an order for security, it must be with that express limitation. His third point was that having regard to all the circumstances of this case no order at all ought to be made.

I do not think that his first point can stand up to any examination at all. It is expressly provided in the Act by s. 1, sub-s. 7, that "Save as expressly provided by this Part of this Act or by regulations made thereunder, (a) the fact that the services of counsel or a solicitor are given by way of legal aid shall not affect the relationship between or rights of counsel, solicitor and client or any privilege arising out of such relationship; and (b) the rights conferred by this Part of this Act on a person receiving legal aid shall not affect the rights or liabilities of other parties to the proceedings or the principles on which

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“ the discretion of any court or tribunal is normally exercised ”. As my Lord has pointed out, s. 12, sub-s. 2 (b) (ii), gives the Lord Chancellor power to make regulations as to the cases in which, and the extent to which, a person receiving legal aid may be required to give security for costs and the manner in which it may be given.

Without taking up any further time upon that matter I am plainly of opinion that the new Act has done nothing to interfere with the right of an assisted person to come to the court at the proper time, on appropriate occasions, to ask for security for costs.

On the question how that sum is to be assessed, I also agree with what my Lord has said. I think that the committee, when they originally dealt with this matter and came to the conclusion that a contribution only should be asked from the wife, must have considered, on sending the matter to the Law Society's solicitor, that the husband himself was not able to make very much of a contribution. Otherwise the case might have been dealt with rather differently. That being the situation, I cannot think that any registrar or any court called on to assess the amount for security is in any way rigidly confined because of that particular provision. Neither do I think that the sum under the new Act of Parliament is to be assessed merely as though the Poor Persons Rules still existed. I think that when a poor person becomes an assisted person under the new Act of Parliament she is an assisted person and must be dealt with under the provisions and regulations of that Act of Parliament.

Finally, Mr. Brodrick submitted that all that was really academic, because in this case no order for security ought to be made. My Lord has already referred to the governing rule of the Matrimonial Causes Rules, 1947, r. 74 (3): “ Where an application for security has been made under this Rule, the Registrar or Taxing Officer shall ascertain what is a sufficient sum of money to cover the costs of the wife ”. That is the first element that he has to take into consideration, “ and if, after taking all the circumstances into account, including the means of the husband and the wife, he considers that the husband should provide security for all or some of the wife's costs, he may order the husband to pay the sum so ascertained, or some portion of it, into court or to give security therefor within such time as he may fix ”. The registrar in this case had before him a very important fact: he knew that the wife had received from the husband the sum of 91*l*. In the course of the argument I ventured to suggest that if the registrar had believed that that sum was in fact paid as security for costs it is the very first thing he would have mentioned in his order. He did not say that. What he did was to incorporate that into the order,

and he did so because he felt that the wife's having received the 91l. was a most material fact for him to consider in exercising his discretion under r. 74 (3).

True, there was before us an affidavit which the wife made on September 1, after the registrar had made his decision on August 18, when he suggested that the parties had better go before the judge. My own view about that matter is that this was eminently a matter for the registrar, experienced in these matters, who knew that 91l. had been paid to the wife in December, 1949. That was a most material circumstance.

In all those circumstances I think that we cannot disturb the registrar's order, and I agree with the conclusion of my Lord that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *G. Parry Jones, Law Society, Divorce Department; Wills Chandler, Burrows & Beach, Basingstoke.*

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26, 28.

Shipping—Collision—Damages—Repairs to be executed at owner's convenience—Permanent repairs impracticable in Great Britain—Vessel sent to New York expressly for permanent repairs—Further damage caused by heavy weather during voyage—Immediate repairs necessary—All repairs executed contemporaneously—Detention longer than needed for repair of collision damage—Whether detention in repairing collision damage recoverable.

Bucknill and
Denning, L.J.J.,
and Lloyd-
Jacob, J.

Reversed.

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The plaintiffs' steamship came into collision with the defendants' steamship and was compelled to put into Greenock where temporary repairs were effected. The defendants admitted liability for the collision. At the material time there were no facilities in Great Britain for the ship to be permanently repaired and the certificate of seaworthiness stated that they should be done "at the owners' convenience". Although permanent repairs were not immediately necessary, the owners arranged for the voyage to be cancelled and for the vessel to go to New York on an ordinary profit-earning voyage, but expressly to have permanent repairs done. While on that voyage the vessel was further seriously damaged by heavy weather, which necessitated immediate repair on her arrival at New York. She was detained there for fifty days, while the heavy-weather damage was repaired.

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Held, that the defendants' liability for the detention of the plaintiffs' vessel attached at the moment of the collision, and that that collision remained the cause of her detention while the repairs due to that collision were effected, notwithstanding that by reason of the heavy-weather damage the ship would in any event have been unable to earn profits during that period of detention, for the heavy-weather damage was incurred when the vessel was sailing to America for the express purpose of having the collision damage repaired.

The Haversham Grange [1905] P. 307, applied.

The Hawk (1927) 30 Ll. L. Rep. 32, distinguished.

Decision of Willmer, J., reversed.

APPEAL from Willmer, J.

In November, 1941, the defendants' steamship *Carslogie* collided with the plaintiffs' steamship *Heimgar* off the west coast of Scotland, and the *Heimgar* was compelled to put into Greenock for repairs. The owners of the *Carslogie* admitted liability for the collision. At the time there were no facilities in Great Britain for permanent repairs to be done to the *Heimgar*, and, after she had undergone temporary repairs, the original voyage to West Africa was cancelled and a voyage to New York substituted for the express purpose of having permanent repairs done in that port. During the voyage to New York the *Heimgar* encountered heavy weather and received such serious further damage that immediate repairs in New York were necessary. The collision damage and the heavy-weather damage were repaired simultaneously, and together detained the ship for some fifty days, ten days only of that period being required for the repair of the collision damage.

On the assessment of damages, the registrar allowed the claim of the owners of the *Heimgar* in respect of the ten days' detention. An appeal by the owners of the *Carslogie* by way of objection to the registrar's report was allowed by Willmer, J., who held that the owners of the *Heimgar* had not proved against the owners of the *Carslogie* any loss by the detention of their ship.

The owners of the *Heimgar* appealed.

Further facts are stated in the judgment.

Carpmael, K.C., and *Vere Hunt* for the plaintiffs. The original voyage of the *Heimgar* was cancelled by reason of the collision, and the vessel was sent to New York to be dry-docked there for the express purpose of having the collision damage repaired. The wrong-doer cannot be heard to say that the owners of the innocent ship are not entitled to have their ship repaired as early as possible. The original collision was the cause of the necessity for the voyage to New York for permanent repairs because they could not be done in Great Britain. Willmer, J.,

was under a misapprehension when, in the course of his judgment, he was considering what constituted "immediate necessity". He said that, according to the certificate of seaworthiness issued after temporary repairs had been executed, permanent repairs were not immediately necessary, and that the decision of the shipowners to have the repairs done immediately did not make them so. Where an innocent ship has suffered damage and must, at some time, undergo permanent repairs, those repairs must be regarded as being "immediately necessary" in the business sense of those words. The judge went on to say that the owners of the damaged ship had a perfect right to send their vessel for repair immediately. He was, however, wrong in holding that the decision to have the repairs done immediately did not confer on the owners of the damaged ship the right to have them done in time paid for by the owners of the wrong-doing ship. The loss of time to the owners while an innocent ship is being repaired is part of the damages, and the right to recover vests at the moment the damage is done: see *The Kingsway* (1).

[DENNING, L.J. That case does not seem to me to assist the court one way or the other.]

[*The Hawk* (2) and *The Chekiang* (3) referred to.]

Scott Cairns, K.C., and M. Rena for the defendants. The circumstances in which the decision to send the *Heimgar* to New York was taken and the purpose of her voyage there must be considered; but the test is whether the damaged vessel was prevented from earning profits. Each case must be considered in the light of the facts which have happened.

[BUCKNILL, L.J. What happens after a collision cannot alter the causation: the question is one of causation of the loss suffered by the plaintiffs.]

The plaintiffs have failed to prove a loss by the detention of their vessel. The heavy-weather damage was only a novus actus interveniens. In the present case the whole fifty days were taken up by the repair of damage caused by the heavy weather. The judgment of Willmer, J., is right. The plaintiffs are not entitled to recover damages in respect of the detention of the *Heimgar* for the ten days occupied in repairing the collision damage, which was done while the ship was immobilized by reason of the heavy-weather damage.

[*The Glenfinlas* (4), *The Ikala* (5), *The Haversham Grange* (6) and *The Kingsway* (7) referred to.]

Carpmael, K.C., replied.

Cur. adv. vult.

(1) [1918] P. 344.

(2) (1927) 30 Ll. L. Rep. 32.

(3) [1926] A. C. 637.

(4) [1918] P. 363, n.

(5) [1929] A. C. 196.

(6) [1905] P. 307.

(7) [1918] P. 344.

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July 28. BUCKNILL, L.J., read the following judgment:—
The only question before the registrar and before the judge was whether the plaintiffs were entitled to receive damages in respect of the detention of the *Heimgar* for the ten days during which the collision repairs were being done. The vessel was under time charter at the time, but was off hire during those ten days. The registrar held that the plaintiffs were entitled to those damages, but Willmer, J., held that they were not.

The facts as stated by the registrar were not disputed before the judge, and were as follows: “The *Heimgar* was under time charter to the Ministry of War Transport, who had ordered her to sail from Hull via the Minch to join a convoy bound for West Africa. Off Oban she was in collision with the *Carslogie*. After the collision temporary repairs to the *Heimgar* were effected at Greenock. It was impracticable to carry out permanent repairs in Great Britain. As a result of the collision the voyage to West Africa was cancelled and a voyage to New York substituted for the express purpose of permanent repairs in New York. In the course of the slow convoy voyage across the Atlantic in the severe winter of 1941 the *Heimgar* sustained considerable heavy-weather damage, in consequence of which she was detained for repairs for nearly fifty days, instead of the ten days attributable to the collision damage repairs”.

A question was also raised before the registrar about the state of the *Heimgar*'s machinery and the advisability of having further repairs done to it at a convenient time. The judge on this aspect of the case said in his judgment: “The facts, therefore, as I find them, are that neither the machinery overhaul nor the collision repairs were immediately necessary, but when the collision occurred opportunity was taken to divert the vessel to the United States of America for the purpose of having both sets of repairs executed contemporaneously. It is equally clear that, but for the collision, the machinery overhaul would have been deferred, and the vessel would have proceeded on her voyage to West Africa. It is common ground that the substituted voyage to New York was a trading voyage, within the time charter, during which the vessel continued to be on hire. In the course of that voyage the *Heimgar* encountered heavy weather, as a result of which she sustained damage which undoubtedly necessitated immediate repair before she could continue trading. It has not been suggested that the heavy-weather damage was in any sense a consequence of the collision, and it is accepted that it must be treated as a supervening event occurring in the course of normal trading. All three sets of repairs were executed contemporaneously in New York, and the vessel was detained, off hire, for a period of fifty days. The average repairs, that is, the collision repairs plus

"the heavy-weather repairs, if carried out independently, could have been done in a month, and the collision repairs, if dealt with by themselves, would have occupied no more than ten days".

The registrar in his report held, in effect, that the rule to be applied in the case was analogous to the rule applied in *The Haversham Grange* (8), because the ship was already bound to a repair port in the United States of America for the purpose of effecting permanent repairs when the heavy-weather damage was done.

The basis of the report of the registrar is as follows: "Where a collision takes place in consequence of which the innocent ship must undergo repairs, and is on the way to the repairers when another casualty occurs, which also necessitates immediate repairs, the owner is entitled to recover damages for detention in respect of the collision repairs from the owners of the wrong-doing ship. Such a subsequent casualty may be another collision, as in *The Haversham Grange* (8), or a grounding not a consequence of the collision, as in *The Empire Squire* (9) and in *The Clan Robertson* (10). In such circumstances, the loss of time attaches, pro tanto, to the prior event. In this particular case the *Heimgar* was already bound to a repair port for the purpose of effecting permanent repairs when she sustained the heavy-weather damage. The detention caused by the heavy-weather damage does not, in my opinion, deprive the owners of the *Heimgar* of their right to recover damages from the owners of the *Carslogie* for the pre-arranged detention in respect of the collision repairs".

The facts in *The Haversham Grange* (11) were set out by Willmer, J., in his judgment, and I will read that portion of it, because he states the matter very clearly: "In that case the plaintiffs' ship (the *Maureen*) was involved in two collisions, both necessitating immediate repairs. Both sets of repairs were executed simultaneously, and the repair of the second collision damage did not in any way increase the period of detention which would in any case have been required for the repair of the first collision damage. In respect of the first collision the plaintiffs' ship and the colliding ship were equally to blame. In respect of the second collision the owners of the colliding ship, *The Haversham Grange*, admitted liability. The plaintiffs in due course recovered from the owners of the first colliding ship 50 per cent. of their claim, including 50 per cent. of the amount lost by reason of the detention of their vessel during repair. They then sought to recover

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(8) [1905] P. 307.

(9) Not reported.

(10) May 26, 1922. Not reported.

(11) [1905] P. 307.

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 1950 "remaining 50 per cent. of their claim in respect of the detention
 "of their vessel.

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"Sir Gorell Barnes, P., confirming the report of the registrar,
 "disallowed the claim, holding that, as the vessel was already
 "incapacitated by something which had previously happened
 "before the second wrong-doing ship ran into her, the repair
 "of the damage done by the second collision did not in any way
 "delay her, and therefore the second wrong-doer was not res-
 "ponsible for any part of the delay, which he had not in fact
 "caused. In the Court of Appeal the claim for detention was
 "abandoned, but the Master of the Rolls, although the matter
 "was no longer before the court, expressed his concurrence with
 "the decision in the court below". It is true that the actual
 decision in that case was that the owners of the second colliding
 ship were not liable to pay for detention during the repairs of the
 damage done to the *Maureen*, but the case also clearly shows that
 the liability to pay for detention attached to the owners of the first
 wrong-doer, and that that liability was not removed because of the
 second collision, which also made further repairs necessary.

I understood Mr. Scott Cairns, for the defendants, to concede
 that if the decision in *The Haversham Grange* (11) were good
 law, the plaintiffs would be entitled to recover damages for
 detention in respect of the ten days if the second damage instead
 of being heavy-weather damage, had been damage by collision
 with another wrong-doing ship. The judge declined to extend
 the rule laid down in *The Haversham Grange* (11) to this case,
 where the second damage was not done by a wrong-doer, but
 by heavy weather. He said in his judgment on that point:
 "Because it was decided in *The Haversham Grange* (11) that the
 "second of the two wrong-doers was not liable to pay damages
 "for the detention of the plaintiffs' ship during a period when
 "she was in any case being detained for repair of the damage
 "incurred in the previous collision, it by no means necessarily
 "follows that a plaintiff can recover damages for detention
 "from the owners of a wrong-doing ship in respect of a period
 "when the ship must in any case be detained for the repair of
 "grounding damage; and I do not see upon what principle it
 "makes any difference whether the grounding damage was
 "received before or after the collision damage. In either case
 "the owner could have had no profitable use of his ship during
 "such time as the grounding damage was being repaired".

With the greatest deference to the opinion of Willmer, J.,
 I am unable to agree with this conclusion. I do not see a
 difference in principle in such a case as this between damage by
 collision and damage by grounding or bad weather damage. For

instance, suppose that the *Heimgar* whilst about to enter the dry-dock for the purpose of effecting the collision repairs, had grounded and had sustained bottom damage which required immediate repair, and the vessel, after being refloated, had continued into the dry-dock where both collision repairs and grounding repairs had been done at the same time. But for the grounding damage, the owners of the *Carslogie* would certainly have had to pay damages for the ten days' detention whilst the collision repairs were being done; and I can see no reason why they should escape this liability because of the second damage which also required immediate repair. In any case, the consequent detention was due to two causes, of which repair of the collision damage was one.

To take a further illustration: suppose that an explosion occurred in the engine room while the collision repairs were being done, which made it impossible to use the vessel until the damage caused by the explosion (which had nothing to do with the collision repairs) was repaired. In those circumstances, would the owners of the *Carslogie* evade liability for detention during the time when both collision and engine room repairs were being executed? I would think not. Also, I think it essential to know whether the heavy-weather damage was received before or after the damage by collision. If, on the one hand, the heavy-weather damage was such as to require immediate repair, it has put the ship out of action as a money-making machine, and it will remain out of action until those repairs have been done. Therefore, a subsequent collision has not caused damage to a money-making machine, and consequently her owners are not entitled to claim damages for loss of profit by her use whilst the collision repairs are being done. If, on the other hand, the heavy-weather damage was done after the collision damage, the question arises whether the rule laid down in *The Haversham Grange* (12) applies.

The second ground on which the judge upheld the objection to the registrar's report was that the collision repairs were not immediately necessary. The judge said that the owners of the *Heimgar* had a perfect right to send their ship for repair immediately, and could not in any way be criticized for doing so. But he said that that decision did not make the repairs any more immediately necessary. It did not confer on the plaintiffs a vested right to have the repairs executed in time paid for by the owners of the wrong-doing ship. With great respect to the judge, I do not agree on this point. When the owners, quite properly, arranged to have their ship sent to the United States of America in order that the collision repairs might be done, I think that the owners of the wrong-doing ship

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It is true that, if the *Heimgar* had been sunk on her way to the United States, the owners of the wrong-doing ship would not have been liable to pay for detention during the repairs. But the reason for that, as explained in *The Glenfinlas* (13), is that the ship, having been lost, ceased to become a potential money-making machine, and therefore her owners did not lose something which did not exist. But the fact that loss of time during repairs is an item in the head of damage which attaches in a sense to the wrong-doer at the time of the damage is shown by the decision in *The Kingsway* (14), where damages for loss of use of the ship during the estimated time of estimated repairs were awarded to the owners of the innocent ship against the owners of the wrong-doing ship, although no repairs had been done up to the time of the reference.

There is this passage in the judgment of Hill, J., in *The Kingsway* (15), on which Mr. Scott Cairns relied: "In my opinion, the plaintiffs have proved with reasonable certainty that the ship will be laid up for permanent repairs for sixteen days. Of course, that is subject to the chance that she may be lost or that she may suffer other damage, and that the repair of that damage and the execution of the permanent repairs can be effected at the same time". It was argued that this statement indicated that if the collision repairs had been executed whilst the owners' repairs were being done there would have been no claim for detention against the wrong-doer. That is true if the owners' repairs were necessary and the opportunity was taken to do the collision repairs which did not require to be done to keep the ship seaworthy. On the other hand, if the owners used the time occupied in repairing the ship in doing their own repairs, which were not necessary, then I think that the owners of the innocent ship would be entitled to detention in accordance with the decision of the House of Lords in *The Chekiang* (16). That case, of course, does not decide the point where both collision repairs and owners' repairs are necessary.

Willmer, J., concluded his judgment by citing this passage from the judgment of Bowen, L.J., in *The Argentino* (17): "'A ship is a thing by the use of which money may be ordinarily earned, and the only question in case of a collision seems to me to be: what is the use which the shipowner would, but for the accident, have had of his ship, and what (excluding the element of uncertain and speculative and special profits)

(13) [1918] P. 363, n.

(14) [1918] P. 344.

(15) Ibid. 354.

(16) [1926] A. C. 637.

(17) (1888) 13 P. D. 191.

“ the shipowner, but for the accident, would have earned by
 “ the use of her? ”.

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Willmer, J., went on to say: “ I ask myself that question
 “ in the present case, and there can be only one answer. The
 “ owners of the *Heimgar* would have had no use of their ship,
 “ and would have earned nothing by her use, for the simple
 “ reason that at the time when the collision repairs were executed
 “ the ship was completely immobilized as the result of damage
 “ received in the heavy weather encountered during the Atlantic
 “ voyage ”.

In my opinion, the judge gave that answer partly because
 (erroneously, as I venture to think) he did not apply the rule
 applied in *The Haversham Grange* (18) to the present case, and
 partly because, as he said, he saw no difference between the
 present case and the case which would have arisen if the *Heimgar*
 had been sunk by heavy weather in the Atlantic. But is there
 not an important difference between the two cases? If the ship
 is lost before the repairs are done, then there can be no loss of
 earnings during her prospective detention for repairs. If, on
 the other hand, the ship is not lost, she will proceed to her
 repairing yard and have her collision repairs done, and at the
 same time may repair other damage due to other causes. Her
 loss of use may be said in such a case to be due to two causes,
 the collision-damage repair and the other damage repair. It
 may be that a perfect equity would in this case divide those
 damages for loss of use equally between the two causes. But
 the rule, as I understand it, is to attribute the detention to the
 first damage which made repair and consequent detention neces-
 sary. In my opinion, the rule should be extended to the present
 case, where the ship was making her way to the repairing yard
 under the necessary arrangements before the heavy-weather
 damage was done.

Mr. Scott Cairns, in support of his argument, referred to two
 cases, one of which was *The Port Denison*, which is cited in
 Roscoe on The Measure of Damages in Maritime Collisions (3rd
 ed.), at p. 171. That case, which at first sight may seem to
 support the defendants' case, only does so if the facts of the
 case were in his favour. Unfortunately, the material facts are
 not stated. The decision is, I think, probably based on the
 fact that the owners' work was necessary, whilst the collision
 repairs were not necessary. If the collision repairs were necessary
 and the subsequent grounding damage repairs were equally
 necessary, then the decision of Mr. Roscoe is inconsistent with
 his decision two years earlier in *The Clan Robertson* (19). [I
 may say that Mr. Roscoe, the registrar who dealt with damage

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claims in the Admiralty Registry, was working on such matters for over twenty years.] *The Clan Robertson* is not referred to in Mr. Roscoe's book, but his report in that case is preserved in the records of the Admiralty Registry. It reads: "*The Clan Robertson*. 1918. Fo. 697. *Reasons for Report*. May 26, 1922. In this reference the claim of the owners of the *Labicum* against *The Clan Robertson*, and the owners of *The Clan Robertson* against the *Labicum* were brought forward for assessment. It is only necessary to refer shortly to the respective claims for loss of use of the vessels during the time when permanent repairs were being executed. Repairs for grounding were done to the *Labicum* at the same time as the collision repairs, and this grounding had taken place subsequent to the collision, but both sets of repairs were necessary. The circumstances were the same in the case of *The Clan Robertson* except that the non-collision injury, caused by striking a submerged wreck, occurred before the collision. On the now long existing decision in *The Haversham Grange* (20) . . . the owners of the *Labicum* are entitled to recover the time lost by the repairs and the owners of *The Clan Robertson* are not, because their vessel would have had to be repaired if a collision had not occurred. Equally also as regards the claim of the *Labicum*, she had to be repaired in consequence of the collision and, according to *The Haversham Grange* (20), the time lost must be allocated to the first occurrence. It could be, and indeed was, argued that the owners of the *Labicum* having to repair their non-collision damage had not lost time in consequence of the collision repairs. But the same argument could be applied to the case of the first collision in *The Haversham Grange* (20), that as the repairs for the second had to be executed, no time was lost by reason of the first collision. But both the Admiralty Court and the Appeal Court have laid down a contrary and simple rule which governs this case". This interesting report is almost exactly in point. In the case of the *Labicum* the grounding took place after the collision and the owners recovered their detention. In the case of *The Clan Robertson* the owners' damage was done before the collision and the owners were therefore not entitled to detention.

Mr. Scott Cairns also relied on a passage in the judgment of Lord Constable in *The Hawk* (21), but the passage must be read with reference to the relevant facts. They were that the steamship *Cameronia* sustained damage by collision with another steamship, for which the other vessel was at fault. The owners of the *Cameronia* in their claim against the owners of the wrongdoing ship included an item for detention of over a period of

fifteen days, that being the period during which the repairs were being executed. The collision damage was not serious, and temporary repairs were done which enabled the vessel to keep her sailings. The collision occurred in June, 1925, but the collision repairs were not done until January, 1926. During the intervening months the ship was carrying on her normal trading and sustained further damage, including damage to her rudder in heavy weather on January 4, 1926, whilst on a voyage to New York. This damage compelled her to return to Glasgow, where she was dry-docked on January 8, 1926. She had also sustained damage to her stem in August, 1925, whilst being berthed. The repairs to her rudder and stem necessitated her remaining in dry dock for a considerable time, and these repairs proceeded simultaneously with and occupied a longer time than did the repair of the collision damage.

In that case Lord Constable in the course of his judgment said (22): "A more complicated question may arise when a ship has been detained by two sets of operations arising from two different accidents, such as two collisions or a collision and a grounding, for which different persons are responsible. In the case where both accidents, or the earlier accident, have disabled the ship, the rule established by *The Haversham Grange* is that liability for detention falls exclusively on the party responsible for the first accident". Then he sets out the facts in *The Haversham Grange* and proceeds: "The question is whether this rule applies to a case like the present, where the act of the first wrongdoer has not disabled the injured ship, where her repair has been postponed, and where, before she has been laid up, an accident has disabled her and rendered her unseaworthy. In my opinion, *The Haversham Grange* (23) rule does not apply to such a case. For the reasons explained in a previous part of the note, I think it would be difficult to affirm that the collision was not a cause of the detention, though the detention was immediately brought about by the accident to the rudder. But the present question does not seem to me to depend upon whether in strictness the collision or the accident to the rudder was the true cause of the detention. Even on the assumption that the repair of the collision damage was the true cause, the pursuers must also show that the detention of the *Cameronia* for such repair resulted in a loss of profit, and they cannot do so when in fact the *Cameronia* was by reason of the accident to the rudder, disabled from earning any profit before she was laid up. The loss of profit was not the direct and natural consequence of the defenders'

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“ wrongful act, nor did it represent what, but for the collision, “ the owners would have earned by the use of their ship ”.

The difference between *The Hawk* (24) and the present case seems to me to be fundamental. In *The Hawk* (24), the ship was compelled to repair her rudder, and was therefore not a profit-earning machine until that repair had been effected. Whilst those repairs to her rudder were being done and whilst the ship was not capable of trading, the collision repairs were also done, and therefore it was right to say that she would have earned nothing whilst those collision repairs were being done, because the ship was then necessarily laid up. In the present case, however, the *Heimgar* was proceeding to the United States of America for the specific purpose of having her collision damage repaired, and the cause of her detention during those repairs was, in my opinion, the collision. The point that she could not in any event have earned a profit during that period by reason of the subsequent heavy-weather damage seems to me to be contrary to the decision in *The Haversham Grange* (25). In *The Haversham Grange* the fact that the innocent ship was incapacitated by the second collision did not prevent her owners from recovering from the first wrong-doer damages for detention during the necessary repairs of the damage caused by the first collision.

There is no clear authority on this point before us, and the case is by no means free of difficulty. I differ from the opinion of Willmer, J., for which I have the most sincere respect, with reluctance. It seems to me, however, that, apart from authority, it would be unjust if in this particular case the burden of the loss fell on the owners of the *Heimgar* and the owners of the wrong-doing ship were able to escape responsibility for the loss of profits of the innocent ship during her detention whilst the collision repairs were being done, solely because the ship happened to sustain heavy-weather damage on her way to have the collision repairs done, and those repairs were done at the same time as the collision repairs.

I therefore think that this appeal should be allowed.

DENNING, L.J. I have approached this case according to the rules of the common law, with which I am more familiar, but the result at common law is the same as the result at which my Lord has arrived according to the rules of Admiralty. The rules of the common law and the rules of Admiralty on the question of damages are, as I understand them, the same.

A person who is guilty of negligence is liable for the damage caused thereby if it is such as he might reasonably be expected to foresee. His liability, as I pointed out in *Minister of Pensions*

v. *Chennell* (26), depends as a rule on two factors, the first being causation, and the second being foreseeability. No question of foreseeability arises here, because it could obviously have been foreseen that a collision might involve the ship being detained off hire during the execution of repairs. The only question here is the question of causation, and the difficulty arises because, although the collision made detention for repairs necessary at some time or other, nevertheless after the collision a new cause intervened to make detention doubly necessary. The ship had to be detained, not only to repair the collision damage, but also to repair the heavy-weather damage. There was thus one detention—one loss of time—but two causes of it.

This problem of two causes co-operating to produce one and the same loss has been fully explored by the common law; and it is perfectly well settled that, where damage is caused by two causes co-operating to produce it, those causes being the separate wrongful acts of two persons, each of them is liable for the whole damage: see *The Koursk* (27). It is no answer for either of them to say that, but for the negligence of the other, the damage would not have occurred: see *North-Western Utilities v. London Guarantee Company* (28). At one time, if one of the wrong-doers was compelled to pay the whole, he had no right of contribution from the other; but since 1935, by statute, contribution is recoverable. Of course, if the injured party sues both wrong-doers, he can only get one satisfaction.

If such is the case where one damage is the result of two separate wrongful acts, it follows inexorably that where damage is caused by two causes co-operating to produce it, one of them being a wrongful act of one person and the other some other event for which no one is responsible, then the wrong-doer is liable for the whole damage: see *Smith, Hogg & Co. v. Black Sea & Baltic General Insurance Co.* (29), and *Monarch Steamship Co. v. Karlshamns Oljefabriker A/B* (30). It is no answer for the wrong-doer to say that, but for the other event, the damage would not have occurred, or to say that, owing to the other event, the same damage would have been incurred anyway, unless, of course, the other event was so powerful an influence in producing the damage that the wrongful act was not a cause at all.

In this case the damage in question is the detention of the plaintiffs' ship whilst repairs were being effected. If the collision may properly be said to be a cause of that detention, then, according to the principles I have stated, the defendants are liable, and it is no answer for them to say that the heavy-weather

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(26) [1947] K. B. 250, 253.

(27) [1924] P. 140.

(28) [1936] A. C. 108, 126-128.

(29) [1940] A. C. 997.

(30) [1949] A. C. 196.

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damage was also a cause of it, or, in other words, that the detention was also necessary owing to the heavy-weather damage.

The case, therefore, depends on causation. This is always a difficult question, but the cases discussed before us show a gradual elucidation of it as applied in Admiralty cases. As I see it, they fall into five categories, which I will summarize: (1.) the case where a vessel is damaged in a collision which makes repairs necessary, and then, whilst she is being repaired, the shipowners take it as a convenient opportunity for doing other repairs. The cause of the detention is the collision, and the shipowners can recover in full for the loss of time while the collision damage is being repaired: see *The Chekiang* (31).

(2.) The case where a vessel is damaged in a collision which makes it necessary for her to be repaired at some time or other, but the repairs are postponed indefinitely, and meantime she continues trading. If she then is involved in a second collision, causing her fresh damage which makes it necessary for her to be repaired at once, then the cause of the detention is the second collision. Likewise, if she is involved in heavy weather necessitating immediate repairs, the cause of the detention is the heavy weather. During the detention the damage from the first collision will doubtless be repaired, but nevertheless the detention is not due to the first collision, and cannot properly be debited to the ship responsible for that collision: see *The York* (32).

(3.) The case where a ship is likewise damaged in a collision, but the shipowners do not postpone the repairs, but determine to have them done at once, as they are entitled to do, and send her to a suitable port for that purpose. If she is then involved in a second collision, or in heavy weather causing her fresh damage, which makes it doubly necessary for her to be repaired, then the causes of her detention are two-fold: first, the damage from the first collision; second, the damage from the second collision, or heavy weather. These two causes co-operate to produce the detention, and each ship is responsible for the detention of which it is a cause. The ship responsible for the first collision is liable for the loss of time whilst the damage due to the first collision is being repaired: see *The Clan Robertson* (33), and *The Empire Squire* (33), to which my Lord has referred. So also at common law it would seem to me that the ship responsible for the second collision (when there is one) would be liable for the loss of time whilst the damage due to the second collision was being repaired. If all the repairs were carried out at the same time, so that there was only one detention for both, then each would be wholly liable for the concurrent loss of time. The injured ship cannot,

(31) [1926] A. C. 637.

(32) [1929] P. 178.

(33) Not reported.

of course; get more than one satisfaction for the same detention. But under the Law Reform (Tortfeasors) Act, 1935, if one wrong-doing ship pays more than her share, she can recover contribution from the other.

(4.) Take a case like the last, but where the first collision is partly due to the negligence of the injured ship as well as to the negligence of the first wrong-doing ship. The injured ship is, in part, responsible for the detention, and, whomsoever she sues, she can only recover a proportion of it. If she recovers satisfaction for her due proportion from the first wrong-doing ship she cannot recover the balance from the second wrong-doing ship. That is, to my mind, the sole effect of the decision in *The Haversham Grange* (34) on this question of detention, which gives in Admiralty the same effect as s. 1, sub-s. 1, (3) of the Law Reform (Contributory Negligence) Act, 1945, in other cases.

(5.) The case where a vessel is damaged by heavy weather and is on her way for repairs when she is involved in a collision which makes repairs doubly necessary. I should have thought that, in some circumstances, it would be proper to say that there were two causes co-operating to produce the detention; and when that is so results should follow such as I have mentioned in the third category. The ship responsible for the collision in that event would be liable for the loss of time while the damage due to the collision was being repaired.

The present case comes within the third category. The detention for ten days was due to two causes: (1.) the collision damage; (2.) the heavy-weather damage. The wrong-doing ship is liable for the loss of time caused by it, even though another cause (heavy weather) operated concurrently to produce it.

I agree with my Lord that this appeal should be allowed.

LLOYD-JACOB, J. I agree that this appeal should be allowed, and, in deference to the judge, from whom I feel constrained to differ, I desire to add a short statement of my reasons. Where, as here, the claim is for detention loss, the shipowner must, of course, satisfy the court that, but for the collision, he would have had the use of his ship as a money-earner during the period of detention. On the view which he took of the facts, the judge characterized the case as one in which the collision did not confer on the plaintiffs a vested right to have the repairs executed in time paid for by the owners of the wrong-doing ship. Having regard to the form of the certificate, I should myself have characterized the case somewhat differently, namely, by saying that "repairs at owners' convenience" did not confer on the defendants any right to have the repairs deferred until they could be

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done in time paid for by the owners of the damaged ship. Whether or not the collision repairs were immediately necessary (a matter upon which the judge and the registrar appear to differ), I take the view that the owners were entitled to, and did, decide that their convenience would best be met by sending their ship to New York for that immediate repair. This was a diversion from the original itinerary and was expressly sought by the owners and permitted by the charterers to enable the collision repairs to be effected. The fact that New York was intended to be the loading port when the ship was satisfactorily repaired does not, in my judgment, convert the passage of the ship in ballast to New York into a trading voyage in the strict sense, and the arrangement made whereby the passage fell within the charter would appear to have been of direct advantage to the owners of the wrong-doing ship by restricting their liability for detention. The heavy-weather damage sustained on the passage out, and which necessitated dry-dock repairs extending over fifty days, was sustained on a voyage the express purpose of which was the completion of permanent repairs arising from the collision, and which took ten days to complete. The ship was therefore detained for fifty days, during which time the owners lost the use of their vessel—and the question arises whether the loss of ten of those days, during which both collision and heavy-weather damages were being repaired, should impose liability on the defendants, whose responsibility for the collision damage is admitted.

The judge felt himself unable to differentiate in principle between immobilization and loss of the vessel due to a happening after the collision and before repair could take place, and regarded the decision in *The Glenfinlas* (35) as in point. The distinction, it seems to me, resides in this: that, whereas when a loss occurs there is nothing to detain, when immobilization occurs detention necessarily results. In the latter case, as the decision in *The Haversham Grange* (36) makes plain, immobilization occasioned by repair of damage due to a second collision does not avoid liability for the detention occasioned by the repair of damage resulting from an earlier collision. In that case the party liable for meeting the damage sustained by the second collision was permitted to take advantage of the immobilization consequent upon the first collision. Had the repairs occasioned by the second collision necessitated detention for a period exceeding the duration of the repair of the first collision damage, I read the decision as justifying a claim by the owners for detention damage for this additional period payable by the party responsible for the second

(35) [1918] P. 363.

(36) [1905] P. 307.

collision. This and a line of other cases establish that liability for the consequences of collision damage is not necessarily avoided if the period of immobilization is in fact used for work other than that occasioned by the collision itself. Were it otherwise, it would mean that in cases where damage caused by a plurality of collisions was repaired during one detention, the owners could recover no damage from any wrong-doer, because each would be able to point to the other as the cause of the detention. I read the cases as directing the court to ascertain from the facts the operative reason for the detention in respect of which damages are claimed.

In the present case the vessel was sent to New York to be dry-docked for repairs. Provided that it reached that port, it would have been dry-docked had no heavy-weather damage been suffered. She did reach New York, she was dry-docked, and the collision repairs were effected. The fact that during the period of this repair some heavy-weather damage was repaired, and also that there was some machinery overhaul, are in my judgment, no ground for relieving the defendants of liability; and the mere fact that the ten days required for repairing the collision damage turned out to be insufficient to permit all the other damage to be rectified cannot of itself alter the position.

In discussing *The Clan Robertson* (37) and *The Empire Squire* (38), the judge, whilst refraining from expressing any concluded opinion, found himself unable to differentiate in principle between the receipt of grounding damage necessitating repair before and after the collision damage which also necessitated repair. I must acknowledge that I share his reluctance to review either decision, but I should point out that the time sequence may well determine the operative reason for the subsequent detention, and thus affect liability. If, as a result of the grounding, a decision to dry-dock for repairs is made, a collision whilst the vessel is awaiting immobilization for that purpose cannot occasion the detention, except in respect of any period beyond that required to remedy the grounding damage. If, on the other hand, by reason of a collision a vessel is dispatched to a dry dock for repairs, a grounding on the way renders the decision no less effective.

The distinction between the present case and such cases as *The Hawk* (39), and *The York* (40), is to be found in the circumstances which led to the decision to immobilize. In both those cited cases the repair of the collision damage was deliberately deferred by the owners until immobilization of the vessel was occasioned by subsequent events. In the present case the

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(37) Not reported.

(38) Not reported.

(39) 30 Ll. L. Rep. 32.

(40) [1929] P. 178.

C. A. decision to immobilize was directly consequent upon the collision and wholly unaffected by subsequent events.

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I agree that this appeal should be allowed.

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Appeal allowed.

Solicitors: *Bentleys, Stokes & Lowless; Clyde & Co.*

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WILLOUGHBY v. WILLOUGHBY.

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Nov. 22.

Husband and wife—Divorce—Care and custody of child of tender years—Mother guilty of adultery—Whether precluded from custody.

Cohen and
Singleton,
L.JJ.

The marriage of a husband and wife had been dissolved on the grounds of the wife's adultery. She had since married the co-respondent, and the father had also married again. Wallington, J., on the application of the father, gave him the care and control of the only child of the marriage, a girl two years of age, on the ground that it could never be in the interests of the child to be entrusted to the care of a woman who had committed adultery once and who therefore might commit it again.

Held, that the judge had erred in principle in the exercise of his discretion in awarding the care and control of the child to the father on the ground that a woman who had once committed adultery was not a fit person as compared with one who had not to look after a child. In the circumstances of the case it was better for the welfare of the child to be brought up by her mother than by her stepmother. The care and control of the child should accordingly be awarded to the mother.

Allen v. Allen [1948] 2 All E. R. 413, applied.

APPEAL from Wallington, J.

The appellant and the respondent were married on March 12, 1942, the father being then in the Merchant Navy. He left that service in 1944 and had difficulty in obtaining employment, with the result that he failed to earn enough to support himself and the mother; and she had to go out to work. The family fell into debt, and when, on September 24, 1948, the child, a girl, was born, they were in receipt of assistance from the National Assistance Board. In February, 1949, the mother went back to her old work in London with the Milk Marketing Board, and the child was sent down to Devonshire to live with the father's mother. At the end of that month the father went to Devonshire to try to find work, leaving the mother behind in London. It was

admitted that in July, 1949, the mother committed adultery with the co-respondent, and that in the following November she went to live with him and had been living with him ever since. On March 24, 1950, the father presented his petition for divorce on the ground of the mother's adultery, and on June 9, 1950, a decree nisi was pronounced, which was made absolute towards the end of July. On August 1, 1950, the mother married the co-respondent, and on August 2, 1950, the father married an Australian registered nurse.

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The father applied for an order for the permanent custody of the child and that it might be placed under his care and control. The mother sought to have the care and control of the child given to her.

The facts are more fully stated in the judgment of Cohen, L.J.

Wallington, J., gave the custody of the child to the father. No note was taken of his judgment. It was agreed by counsel that the main reason which he gave for not giving custody to the mother was that a woman who had committed adultery once might commit it again. He also stated that it was a shocking thing that the adultery took place as early as July, 1949, only nine months after the birth of the child. The judge expressed the opinion that it would be better "socially" for the child to live with the father at Paignton. The mother appealed.

Salmon, K.C., and *Loudoun* for the mother. It is submitted that the judge went wrong in principle in awarding the care and control of this little girl to the father. The main ground of his decision was that a child should not be left in the care of a woman who had committed adultery and might well do so again. It is plain that he considered that a woman who had committed adultery was unfitted to have the care of a child. That was the view which the same judge took in *Allen v. Allen* (1); but the Court of Appeal reversed his decision, holding that there was no such principle and that the child's welfare, both moral and physical, was the test to be applied. The facts in this case are very similar to those in *Allen v. Allen* (1). *Prima facie*, it is submitted, it is in the best interests of a girl of two years that she should be looked after by her own mother. The custody should be given to the mother, against whose character no allegation is made except that she committed adultery with the co-respondent, whom she has now married.

Bolland for the father. The judge in his reasons for awarding the care and control to the father stated that it would be better "socially" for the child to live at Paignton. He considered that it would be better for her to live with her stepmother. He

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1950 that there are no grounds for varying the order which he made.

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COHEN, L.J. On September 24, 1948, a daughter was born. After the birth of the child, while the mother was unable to work, the parties were compelled to have recourse to the National Assistance Board for their maintenance. As the father was still unable to earn enough to keep his family, in February, 1949, the mother went back to her old work in London with the Milk Marketing Board, and the child was sent to Devonshire to the husband's mother. At the end of February, 1949, the husband himself went to Devonshire to try to find work, leaving his wife behind working in London. He did not contribute to her maintenance.

In July, 1949, it was admitted, an act of adultery took place between the mother and the co-respondent, and in the following November she went to live with the co-respondent. She has lived with him ever since.

On March 24, 1950, the father presented his petition for divorce, and on June 9, 1950, a decree nisi was made, a defence being put in solely in relation to custody and the care and control of the infant. The decree nisi was made absolute towards the end of July, and the mother married the co-respondent on August 1, 1950. On August 2, 1950, the father married a lady aged thirty-one, who was registered in Australia as a nurse. On July 25, 1950, shortly before the decree nisi was made absolute, a summons was issued by the father for custody of the infant. The matter came before Pearce, J., who made an interim order for custody in favour of the father and directed that the child should remain in his custody, which meant for practical purposes its living with the father's mother until further order. It was further ordered "that no order be made on the wife's application for the care and control of the child, save and except that the child should spend the month of October, 1950, with the mother". Liberty was given to either party to restore the summons during October, 1950.

The intention of the order was that the status quo should be maintained during the summer months, when it was desirable that the child should be allowed to remain at the seaside; that the mother should have access to the child in October; and that subsequently the matter should be brought again before the court so that a more permanent position could result.

In October the father restored the summons and applied for an order that he might be given permanent custody, and that the child might be placed under his care and control. He was quite willing that the mother should have access. That matter came before Wallington, J., on November 6, 1950, who had a mass of

evidence before him. On the original application there had been affidavits by the father and mother, the father's mother and his sister, which proved that the child had been with the father's mother since February, 1949, up to the date of the hearing before Pearce, J.

The father's sister put in an affidavit which was intended to show that the mother had not taken a great interest in the child during the intervening period. It said that she had only telephoned four times, had never been to see the child, and had not answered the sister's letters about the child. The mother replied by pointing out that she did not want to unsettle the child, and that in any event it was difficult for her, working in London, to find the time to go to Devon and see the child; also, she added, at the time when she allowed the child to be taken to the father's mother's house in Devon, it was because the father was unemployed, they were in debt, and the mother had no alternative but to find employment. "And when I found this", she said, "I managed to contribute out of a small salary clothes and toys for the said child. . . . But for the fact that I had to earn my living at this time, I would never have parted with the child."

When the summons was restored in October the mother had already married the co-respondent: there was no longer the difficulty of asking that the child should be allowed to live at a house in which an adulterous establishment was being conducted, and the mother asked that she might be given the care and control. She supported that application not only by her own affidavit but by an affidavit from a local doctor, who deposed to the suitability of the mother's home and to the excellent health in which the child was after having been with her for three weeks.

The father put in an affidavit in reply, in which he referred to his own marriage, and pointed out that, if the child were allowed to be with her stepmother, she would be well-looked after, since the stepmother was an Australian state-registered nurse who was familiar with problems arising out of the care of children. He also gave evidence as to the place where he proposed to live, which was a self-contained flat containing a living room, bedroom, kitchen and bathroom, and having a garden satisfactorily enclosed. So far as accommodation was concerned, that had to be compared with a three-bedroomed flat in which the mother and her new husband were living, and where there would be, at any rate until more children were born, a separate room for the child. There was also an affidavit by the stepmother as to her willingness and intention to look after the child and be a mother to her.

The evidence showed that the stepfather's income as an architect was about 650*l.* a year, out of which he might have

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C. A. to provide something for his child by a former marriage. The father's income was 7l. 10s. a week.

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Finally, there was an affidavit by the wife replying to that evidence, which contained this sentence: "I do not for one moment question the capability of" the father's second wife "to bring up my said child but I question whether she is any more capable of so doing than I am myself". The mother said with regard to her failure to see the child during the eighteen months from February, 1949: "I took no steps to see the child because I had to take employment in order to support myself, the petitioner then being unemployed, and further that had I made spasmodic visits to the said child in Devonshire I should have found it unbearably distressing to have left her at the conclusion of each such visit".

On that evidence the matter came before Wallington, J. He gave the father the care and control of the child, and also the custody.

In those circumstances the parties intimated that there might be an appeal, and the judge, who had at that stage merely stated that he was satisfied that it was in the interests of the infant that he should give the care and control to the father, then proceeded to give his reasons. There was no note of his judgment. According to Mr. Loudoun, who appeared for the mother, the main reason which the judge gave was that he did not think it could ever be in the child's interest to be entrusted to the care of a woman who had committed adultery once and might, therefore, commit it again. He also said that it was a shocking thing that the adultery took place as early as July, 1949, only nine months after the birth of the child.

Mr. Bolland, who appeared for the father here and in the court below, agreed that the judge had given those reasons, but he said that they were only subsidiary reasons and he had also given other reasons. First, he had said, here was a woman who came before him saying that she would do anything for the child; but how could he accept that when she did not see the child for eighteen months? The judge did not refer to the reasons which the mother had given for not doing that. Mr. Bolland said that the judge gave as the main reason for the child's being left with the father that it was better socially for her to be at Paignton and to be looked after by the stepmother, who was a trained registered nurse.

Can we safely accept what we are told was the real ratio decidendi given by the judge, that it would be better socially for the child to be at Paignton with the father and be looked after by the stepmother than to be with her mother at Kew? I share the difficulty that my brother Singleton expressed in the course of the argument in not knowing what is meant by the expression

"socially": I cannot see why it should be said to be better for a child, aged two, to be with the father and stepmother than with the mother and stepfather. True, there was the one act of adultery; but, on the other hand, the father can hardly be proud of his failure to support the mother or the child from the time that he left London until the marriage broke up; nor can I think that, having regard to the child's age, its visiting list, to which Mr. Bolland referred, could be seriously affected by the mother's divorce.

The real difficulty is this: in a matter which is a matter of discretion, we must not interfere with the judge's decision unless we are satisfied that he went wrong in principle, or, possibly, this being a custody case, that the evidence clearly shows that the order of the judge would be detrimental to the infant. Mr. Salmon says that it is as plain as a pikestaff that in this particular case the judge did go wrong in principle in that he disregarded what this court said in *Allen v. Allen* (2), a case under s. 1 of the Guardianship of Infants Act, 1925.

The facts in that case were as follows: After a decree of divorce had been granted to the husband on the ground of his wife's adultery an order was made granting him the custody, care and control of the daughter of the marriage, aged eight years, who, until then, had been in the care and under the control of the wife. Since the decree absolute the wife had married the co-respondent. The judge, in deciding to make the order, regarded the moral welfare of the child as of paramount importance and took the view that the wife, having once committed adultery, was likely to do so again, and that, since the husband was married to a second wife against whose moral character no charge could be made, he was more fit to have the care of the child. There was little to choose between the accommodation offered by the parties, but it was not disputed that the child was happy with her mother and making good progress at school; and there was medical evidence to the effect that her health would suffer if she were separated from her mother.

There is no doubt that in some respects that case resembles the present, though in the present case there is no medical evidence that the child's health would suffer if she were separated from her mother. She has not been much with the mother. On the other hand, I think it is clear that the accommodation offered by the mother is better than that offered by the father. Be that as it may, those are subsidiary factors and would not justify our interfering with the exercise by the judge of his discretion. Therefore, I pass to what Wrottesley, L.J., said in giving his reasons for interfering with the decision of the judge in *Allen v.*

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C. A. Allen (3). He said: "He (Wallington, J.) obviously regarded
 1950 "the moral welfare of the child of paramount importance, and
 WILLOUGHBY "was of opinion, on the one hand, that a woman who has once
 v. "committed adultery was likely to do it again, and, on the
 WILLOUGHBY. "other, that the father now had a wife who had not committed
 "adultery and was, therefore, more fit to look after the welfare
 Cohen, L.J. "of the child. That was not the proper test to apply. The
 "welfare of the child, both moral and physical, was the para-
 "mount consideration. It was impossible to say, because a
 "woman had once committed adultery she was not a fit person,
 "vis-a-vis one who had not, to look after a child. There was no
 "suggestion that the mother was promiscuous, or a bad mother,
 "or a bad housekeeper, or anything which made it undesirable
 "for her to look after the child. All the evidence in the case is
 "strongly in favour of leaving the child with her . . .".

In the present case, although the judge may have referred to other matters, the predominant reasons which actuated his decision were those to which he had paid great attention in *Allen v. Allen* (4), which was not cited to him in this case. I think that he must have overlooked the fact that this court had decided that the reasons he there gave were not such as should be treated as decisive of the issue between the parties. At any rate, I am satisfied that these same reasons played such a part in his decision that we are bound to say that he has gone wrong in principle, and that we are bound to give the matter the best consideration we can having regard to all the circumstances as disclosed by the affidavits.

In the present case it is true to say, as it was in *Allen v. Allen* (4), that there is no suggestion and no evidence that the mother was promiscuous or a bad mother. I think that the reasons she gave for her failure to see the child in the past eighteen months are such that the father cannot complain of them, having regard to his failure to support the mother at any stage in the latter part of the matrimonial life.

There is no evidence that she was a bad housekeeper or that she was unclean. On the other hand, we are dealing with a girl of two years, and to a child of that tender age I do not think a stepmother, however anxious to do her best for the child—and it is accepted that the father's second wife can be so described—can take the place of the mother.

We are bound to take into consideration the possibility that both families may have more children, and in those circumstances it seems to me that the mother is more likely to give the attention to this child that the child needs, than a stepmother who, however

(3) [1948] 2 All E. R. 414.

(4) *Ibid.*, 413.

anxious to perform her duties, will naturally be more interested in the needs of a child who is her own child.

Therefore, since the judge has gone wrong in principle in adhering to the view he had expressed in *Allen v. Allen* (4), the proper order is that the child should be entrusted to the care and control of the mother until further order. I say nothing about access, since the mother has stated her willingness to give full access to the father and to allow the child to spend parts of her time with him. She should take a most generous view of this matter: the child should spend a substantial period with the father; but, subject to that, the child should remain with the mother. It is always open to the father, if there is any change in circumstances, to apply to this court again. For these reasons I would allow the appeal.

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SINGLETON, L.J. I agree. This case presents great difficulty. I do not suppose that there is any more difficult or more anxious task for a judge than the question of custody, and it is one that arises very often. [His lordship stated the facts and continued:] The father married a perfectly respectable woman. He took the child from his mother, and his desire now is that the child should live with him and his new wife. On the other hand, the mother would like at least the care and control of her two-year-old daughter.

The order of Wallington, J., gives the custody to the father, and also the care and control, so that the mother is deprived of the care and control of the two-year-old girl. The child, too, is deprived of her mother's care. She has the opportunity of a stepmother's care, but that is not always the same thing.

It is said against the mother that she did nothing for her child for many months. The mother was in difficulties: she was working; the father was not. He had left London and gone to Devon where the child was, and he lived with his mother at week-ends. He got work after a time. I know no reason why he could not have got work in London. The mother having had to go out to work, I do not think that she is to blame in that she has not seen as much of her young child as normally she might have done.

My Lord has said, and I repeat, that this court ought not readily to interfere with the discretion of a judge on matters of this kind. At the same time the judge who made the order now under appeal was not the judge who had heard the original petition. So far as we know he had never spoken to, or been spoken to by, the mother. The father was asked some questions at the hearing before the judge; but, apart from what was alleged in the petition,

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and apart from the fact that the commissioner in divorce had granted a decree against the mother, the judge who made this order did not know any more about her than that which is contained in the affidavits.

There is no great difference between counsel as to what took place before Wallington, J. I have not found it easy to follow some of the reasons given by the judge for making his order. It seems to me that they are at variance with the decision of this court in *Allen v. Allen* (4). If that be so, it is our duty to look at the facts and to decide what order it is proper to make in the circumstances. It is said that it is better for the child to be with the father and the stepmother at Paignton, than with the mother at Kew, and one of the judge's reasons for coming to that conclusion was that it would be better for the stability of the child because the mother had already committed adultery once and therefore might do so again. It may be undesirable, and in some cases it is undesirable, that the care and control of a child should be given to a mother if she has committed adultery; but it is not a rule to be followed in all cases. Indeed, Parliament has said that the consideration in a matter of this kind is the welfare of the infant and that that is the first and paramount consideration.

Nothing has been said against the wife's capabilities as a mother: all that is said against her is that she has committed adultery. I have yet to learn that the fact that a woman commits adultery prevents her in all circumstances from being a good mother.

The view which I take coincides with that of my Lord, that is, that it is better for this two-year-old girl to be under the care and control of her mother, at least for the present. I hope that it will end satisfactorily for the child and for the parents also.

The affidavit of the mother sworn on November 3 of this year contains this passage:—"I repeat what I have said in my 'affidavit sworn herein on October 20, 1950, that I am perfectly 'willing that the petitioner and his mother shall visit the child 'as and when this can be conveniently arranged and I am further 'perfectly willing that periodical stays with the petitioner and 'his mother in Devonshire shall be made, even though I am of 'the opinion that it is not in the best interests of the child now 'that she is getting bigger to have to live in the flat in Paignton 'in which there is only one bedroom as previously mentioned 'herein'. The mother says that she is willing for the child to visit the father. She must remain so, in the interests of the child and to save costs, for these proceedings are indeed costly. But it is better for this young child to be in the care of the

mother, where she has every chance, as far as I see, of being brought up respectably.

I have felt a little unhappy in that we are interfering with the discretion of a judge in a matter of this kind; but it seems to me that we ought so to do, having regard to the reasons given by him for the order which he made. They were reasons given when an appeal was mentioned, and it must therefore be taken that they were reasons seriously actuating the judge and prompting him towards the decision at which he arrived. I do not think that they were good reasons. The appeal should be allowed, and the order should be varied in regard to the care and control of the child as stated by my Lord.

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Singleton, L.J.

Appeal allowed.

Solicitors: *Cooper, Bake, Fettes, Roche & Wade; Kenneth Duthie & Co.*

B. A. B.

SCOTT v. SCOTT.

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1950

Nov. 17.

Husband and wife—Maintenance—Wife's application for injunction to restrain husband from removing assets out of jurisdiction—Jurisdiction of court before right to maintenance established—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 5, sub-ss. 1 and 2.

Somervell and
Birkett, L.JJ.

It is an established principle that the courts will not grant a wife an injunction to restrain her husband from removing any of his assets out of the jurisdiction of the courts unless there has been and remains a subsisting order for the payment of a sum of money. That principle still applies where an application has been made to the High Court under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, for maintenance on the ground that the husband has been guilty of wilful neglect to provide reasonable maintenance for the wife and the infant children of the marriage.

Newton v. Newton (1885) 11 P. D. 11; *Burmester v. Burmester* [1913] P. 76; *Jagger v. Jagger* [1926] P. 93, applied.

APPEAL from Wallington, J.

The applicant and her husband were married in August, 1930. In September, 1950, the wife, who alleged cruelty, left her husband and took with her some of the children of the marriage

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She then by summons under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (1), applied to the High Court for periodical payments for herself and the children and for a secured provision on the ground of the husband's alleged wilful neglect to maintain. Before the hearing and final determination of the summons the wife, having, she alleged, received information that her husband was realizing all his assets and intended to emigrate to South Africa, applied ex parte for an injunction to restrain him from removing his assets out of the jurisdiction.

Wallington, J., refused to grant an injunction on the ground that he had no jurisdiction to do so before any order contemplated by s. 5 had been made. The wife appealed.

John Latey for the wife. It must be conceded that the existing authorities, decided under previous statutes, such as *Newton v. Newton* (2), are against this appeal; but it is submitted that there is a fundamental distinction between the remedies sought in those cases and the remedy sought in the present case. The summons is brought under the recent Act of 1949 for maintenance on the ground of the husband's alleged wilful neglect to maintain, and the husband is attempting to avoid his common-law obligations and to deprive the wife of her statutory remedy. This court, it is submitted, has an inherent jurisdiction, in its discretion, under s. 45 of the Supreme Court of Judicature (Consolidation) Act, 1925 (3), to grant an injunction. A wife has, prima facie, a common-law right to be maintained. Here the applicant wife is availing herself of new machinery under the Act of 1949 to proceed in the High Court; and it is submitted that where, in a proper case, the evidence establishes a likelihood that the court's own powers are going to be set at naught, it will

(1) Law Reform (Miscellaneous Provisions) Act, 1949, s. 5, sub-s. 1: "Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the High Court in England, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation".

Sub-s. 2: "Where the court makes an order under this section

"for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveyancing counsel of the court".

(2) (1885) 11 P. D. 11.

(3) Supreme Court of Judicature (Consolidation) Act, 1925, s. 45: "The High Court may grant a mandamus or an injunction or appoint a receiver, by an interlocutory order, in all cases in which it appears to the court to be just or convenient so to do . . ."

intervene to protect the wife and children. Not to do so would be to go against the intention of s. 5 of the Act of 1949.

Brandon, for the husband, was not called on to argue.

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SOMERVELL, L.J. [after reading s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, and stating the facts:] The question here is not on the facts but on the question of jurisdiction. The judge granted an interim injunction, but when the summons came on for hearing he decided that he had no jurisdiction to grant an injunction at that stage in the proceedings, namely, before any order as contemplated by s. 5 had been made.

Unaided by authorities I would have said that that was plainly right. The general principle of our law is well known, i.e., that an injunction of this kind cannot be granted quia timet before some right to relief has been established. Therefore, reading this section by itself, notwithstanding the fact that it gives the court the power to secure the payment, I would have said that if Parliament had intended that there should be what may be, as Mr. Latey has submitted, a very important safeguard in some cases, it would have expressly so provided.

We are not unaided by authorities however. Under statutory provisions which, I agree, were different, but which seem to me for this purpose analogous, it has been held that an injunction of this kind cannot be granted. The headnote to *Newton v. Newton* (4) states: "The court will not, in order to protect a wife's right to alimony, restrain a husband from removing his property out of the jurisdiction of the court before an order for alimony has been made". There was a considered judgment by Sir James Hannen. He overruled a case in which he had previously given a decision in a contrary sense, examined the authorities, considered the matter in the light of the principle, and said (5): "I come to the conclusion that as it has been decided that the Judicature Act does not give any enlarged powers to the court in this respect, it is not competent for a court, merely quia timet, to restrain a respondent from dealing with his property. The case would be different, of course, if the circumstances were the same as in *Sidney v. Sidney* (6). In that case that decision would be binding on me".

Sidney v. Sidney (6) is interesting, because there a decree absolute of divorce had been made. The court had ordered permanent maintenance to be secured to the petitioner, and an application was made by the wife to restrain the husband from dissipating his property for the purpose of putting it out of the control of the court. Sir James Hannen said (7): "It is to be

(4) 11 P. D. 11.

(5) Ibid. 13.

(6) (1867) 17 L. T. 9.

(7) 11 P. D. 12.

C. A. "observed that in that case there was, what there is not in this
1950 "case, a subsisting order for the payment of the annuity".

SCOTT That principle was followed by Sir Samuel Evans, P., in
v. *Burmester v. Burmester* (8), and in this court in *Jagger v.*
SCOTT. *Jagger* (9). It is quite true that in the latter case there were
Somervell, L.J. other grounds on which certainly two members of the court
thought that the matter could be decided, but Lord Hanworth,
M.R., and Scrutton, L.J., stated the principle which I think
puts the difficulty in the way of the appellant here. The latter
said (10): "I am not aware of any statutory or other power in
"the court to restrain a person from dealing with his property
"at a time when no order against him has been made".

I think that in any event, therefore, Mr. Latey will be in
great difficulty in asking us to disregard what has been so plainly
approved by this court, and I do not think that the distinctions
which he emphasized between the old position and that under
s. 5 of the Act of 1949 affect in any way the principle which was
laid down in those cases. For those reasons I think that the
judge was right in saying that he had no jurisdiction at this stage
in these proceedings.

There was a matter raised by cross-appeal as to which I gather
there is no dispute. The interim injunction was granted, and
it is said to be doubtful whether on its terms it was automatically
dissolved by the judge's decision. There is no doubt that it must
be dissolved. The appeal must be dismissed and the interim
injunction, granted on October 20, is to be treated as dissolved.

BIRKETT, L.J. I agree. We are not concerned with the
merits of this application—the future will disclose what the real
merits are—but one cannot help being sympathetically attracted
to the arguments of Mr. Latey on the suggested merits. It is,
however, important here that we should confine ourselves strictly
to the legal question whether Wallington, J., was right on the
authorities in deciding as he did.

It seems to me that there is really no escape from the principle
laid down in the authorities which have been cited. Therefore
Mr. Latey submitted to this court that, whatever the effect of
those decisions may be, and whatever were the circumstances in
past days, since the Law Reform (Miscellaneous Provisions) Act,
1949, has come into force there is a new situation, for now a
wife may by way of originating summons make an application
for maintenance. He therefore says that the earlier decisions
ought not to stand in the way and that an injunction ought to
be granted. I cannot think that the new Act affects in any way

(8) [1913] P. 76.

(10) Ibid. 102.

(9) [1926] P. 93.

the principle which has been laid down in the cases cited. I agree with the conclusion announced by my Lord.

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Appeal dismissed.

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Birkett, L.J.

Solicitors: *Rider, Heaton, Meredith & Mills, for Bellyse & Eric Smith, Nantwich; Robinson & Bradley, for A. E. Whittingham & Son, Nantwich.*

A. W. G.

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Dec. 11, 20.

Shipping—Salvage—Collision damage—Consequent salvage services rendered by vessel in same ownership as wrong-doing ship solely to blame—Salvage award to be included in claim for damages arising out of collision—Salvors not disentitled—Circuity of action.

Somervell,
Singleton and
Birkett, L.JJ.

Reversed. LARS
LORIE N.S. CO. v.
NORWEGIAN GOVT.
[1952] A.C. 292

A steamship operating under a bare-boat charter to the British Government, and manned by British officers and crew appointed on behalf of that Government, was held to be alone to blame for a collision which occurred in April, 1942, between her and the steamship *Susan V. Luckenbach*. In consequence of the damage sustained, the *Susan V. Luckenbach* was compelled to receive salvage assistance which was rendered by vessels also belonging to the Crown. The salvors recovered certain sums in an action claiming salvage. The owners of the *Susan V. Luckenbach* appealed against the salvage awards on the grounds (1.) that, as the owners of the salving vessels were also the owners of the vessel solely responsible for the collision damage which made the salvage necessary, they were not entitled to an award for their services; and (2.) that, as any salvage award must necessarily be included in the assessment of the collision damages, there would be circuity of action, which ought to be avoided.

Held, (1.) that salvage was recoverable by the owners of the salving vessels even though they were also the owners of the ship held solely to blame; (2.) that as, owing to limitation of liability, the owners of the innocent vessel would not be recovering from the owners of the wrong-doing vessel, as part of the damages awarded to them, the same sum in respect of salvage as they had paid to the salvors, there was no circuity of action; and (3.) that there was also

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no circuitry of action because the salvors were a different department of the Crown from that which, if the Crown could have been sued through its appropriate department (the Ministry of Transport), would have been the defendants to that action.

The Kafiristan [1938] A. C. 136, applied.

APPEAL from Pilcher, J.

In April, 1942, the American steamship *Susan V. Luckenbach* came into collision, in the Gulf of Suez, with the Danish steamship *Nea Hellas*. In an action brought by the owners of the *Susan V. Luckenbach* claiming damages against the *Nea Hellas*, Pilcher, J., in July, 1945, pronounced the *Nea Hellas* alone to blame for the collision. At the time of the collision the *Nea Hellas* was operating under bare-boat charter to the Crown and was manned by British officers and crew appointed on behalf of the Crown by the Ministry of War Transport. In accordance with the general practice then existing, the writ was issued against the master of the *Nea Hellas*, and the Treasury Solicitor, on the instructions of the Minister of Transport, entered an appearance on behalf of the master. The decision of Pilcher, J., was affirmed on appeal. By reason of the collision, salvage of the *Susan V. Luckenbach* became necessary, and those services were rendered by the special salvage tug *Confederate*, which, at the material time, was being operated by the Admiralty Commissioners, and *H.M.S. Arpha*. The salvors brought an action against the owners of the *Susan V. Luckenbach* claiming remuneration for their services. In July, 1950, Pilcher, J., made awards of 24,000*l.* in respect of the services by the *Confederate*, and 1,000*l.* in respect of the services by the *Arpha*, £300 of which he apportioned to the commanding officer and crew of the *Arpha*.

The owners of the *Susan V. Luckenbach* appealed against those awards, except that they did not dispute the award of 300*l.* to the commanding officer and crew of the *Arpha*.

Further material facts are stated in the judgment.

Naisby, K.C., and *Porges* for the owners of the *Susan V. Luckenbach*. No question of quantum arises: the court is solely concerned with questions of principle. The sole cause of the salvage services in question was the collision which was held to be solely due to the negligence of the master of the *Nea Hellas*. That vessel was, at the material time, operating under a bare-boat charter to the British Government, manned by British officers and crew appointed by the British Government. It is submitted that the Crown was the owner of the *Nea Hellas* which caused the necessity for the salvage services, and that the Crown is in consequence not entitled to an award of salvage for services which were rendered necessary by the negligence of its own servants.

The plaintiffs in the collision action, who are the defendants to this salvage action, are entitled to add, in assessing their collision damages, the sum awarded for the salvage of their damaged ship. The Crown would, in the circumstances, be required to pay back to the owners of the *Susan V. Luckenbach* the amount of the salvage award made against them in favour of the Crown. That would result in circuitry of action, which will justify the court in interfering with these salvage awards. It is submitted that the Crown is disentitled to any award by reason of the rule that no man can profit by his own wrong.

Roland Adams, K.C., and *Vere Hunt* for the salvors. There is no possible circuitry of action in the present case because the collision action was not brought against anyone who is a party to this salvage action. It is submitted that the rule that no man can profit by his own wrong does not apply in this case. On that Lord Wright said in *The Kafirstan* (1): "It is true that "the owners of the other colliding vessel are in law responsible "for the damages caused by the negligence of their servants "including the amount of any salvage awarded to the salving "vessel which they also own, but the equities are best worked "out by making the salvage award without regard to the fact of "common ownership, leaving the incidence of what is awarded "to depend on the relative proportions of blame".

Salvage is the performance of a voluntary service for which a salvor is entitled to an award, and is a service which public policy encourages by an award. It lies quite outside the meaning of the phrase that "no man can profit by his own wrong". The present case cannot be distinguished from *The Kafirstan* (2) in its broad principles, and the salvors are entitled to an award.

Naisby, K.C., in reply.

Cur. adv. vult.

December 20. SOMERVELL, L.J., read the following judgment of the court, in which he stated the facts and continued:—It is not disputed that the salvage services, remuneration for which is claimed in this case, were rendered necessary by the collision with the *Nea Hellas*. This is the basis of the defence with which this court is concerned, and which is set out in paras. 4 and 5 of the defence as follows:—" (4.) At the time of "the said collision, the Crown, through their department the "Ministry of War Transport (now the Ministry of Transport) "were the owners of the *Nea Hellas*. In the premises the "defendants say that the said plaintiffs, being also a department "of the Crown, are not entitled to salvage remuneration in

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(1) [1938] A. C. 136, 148.

(2) Ibid. 136.

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"respect of services rendered by their vessel *Confederate* or "*Arpha*, or either of them, inasmuch as such services became necessary solely owing to the negligence of the Minister of War Transport or his servants or agents. (5.) Further or alternatively the defendants say that, in order to avoid circuity of action, no salvage award should be made to the plaintiffs, the Commissioners for executing the office of Lord High Admiral of the United Kingdom, inasmuch as the said Minister of Transport" (then the Minister of War Transport) "would be liable to pay the amount of such award, if any, to the defendants as damages arising out of the said collision".

Pilcher, J., held that the case was covered by the decision of the House of Lords in *The Kafirstan* (3), and he decided as we have stated. Before coming to that case we will refer to two previous decisions referred to in Lord Wright's speech in that case.

In *Cargo ex Capella* (4), the court considered a case in which the vessel claiming salvage had been held in part to blame for a collision which rendered the salvage services necessary. Dr. Lushington held that the owners and master and crew of the vessel were disentitled to claim. He based himself on the principle that no man can take advantage of his own wrong. That decision has been followed, but in *The Kafirstan* (5) Lord Wright expressed some doubt[§] as to it. Its importance in the present case is that the principle has not been applied to cases where the salving ship not concerned in the collision was in the same ownership as a vessel to blame for the collision.

In *The Glengaber* (6), Sir Robert Phillimore had to consider claims for salvage services rendered by a number of tugs, with only three of which we are concerned. One of the tugs claiming salvage, the *Black Prince*, had been held partly to blame for the collision. Sir Robert Phillimore held that she was not entitled to salvage "the necessity for which her own misconduct had occasioned". He applied the principle laid down by Dr. Lushington. Mr. Millward, Q.C., submitted that another of the tugs, the *Warrior*, came under the same rule, as her owners were also owners of the *Black Prince*. They were not wholly in the same ownership, but they had common part owners. Sir Robert Phillimore did not accept the submission. He said (7): "But, on principle, I do not think the objection can stand; certainly, it could only stand with regard to those owners themselves"—that is the joint owners—"and could not in any way affect the claim of those who were not joint owners of the *Black Prince*, and could not affect the crew, who assisted as

(3) [1938] A. C. 136.

(6) (1872) L. R. 3 A. & E. 534; 1

(4) (1867) L. R. 1 A. & E. 356.

Asp. 401.

(5) [1938] A. C. 136, 149.

(7) 1 Asp. 402.

"salvors; but I know of no precedent for saying that because a vessel belongs to the same owner as the vessel which has done the mischief (being wholly unconnected with the act of mischief itself, and there being no suggestion of any conspiracy . . .) such a vessel cannot recover salvage reward". He held that she could. Later, referring to another tug which was said to be disentitled because she had been employed by the *Black Prince*, he said: "The *Black Prince's* misconduct cannot extend beyond herself".

In *The Kafiristan* (8), remuneration was claimed for salvage services rendered to the *Kafiristan* by the *Beaverford* after a collision with the *Empress of Britain*. The *Beaverford* and the *Empress of Britain* were both owned by the Canadian Pacific Railway. When the salvage arbitration started the question of liability for the collision had not been settled. The point was raised whether, if she were held or admitted to be to blame wholly or in part, this would disentitle the owners—not the master and crew—from claiming salvage remuneration. Between the arbitration and the appeal arbitration the collision case was settled on the basis that the *Empress of Britain* was three-quarters to blame. The matter came before the court on a special case stated by the appeal arbitrator. Both arbitrators had held that the Canadian Pacific Railway were not entitled to salvage. This was affirmed by Bucknill, J., and this court, but was reversed in the House of Lords. Lord Wright, with whom the other noble and learned lords agreed, referred to *The Glengaber* (9), and said (10): "Your Lordships were asked to say that the principles laid down by Sir Robert Phillimore in *The Glengaber* (9), were bad law. On the contrary, they are, in my judgment, sound in reason and supported by authority". Earlier in his speech he had said (11): "There does not seem to be any reason in equity why the salved vessel (if I may adopt that sort of personification of the ship, which, as Lord Sumner has said in *The Susquehanna* (12), is inveterate in Admiralty cases) should not pay the appropriate salvage remuneration merely because the salving vessel belongs to the same owners as the other colliding vessel. That fact seems to me irrelevant so far as concerns the usefulness and meritorious character of the actual services rendered. This is not less true when the possibility of the other colliding vessel being held to blame in whole or in part is taken into account".

The argument under consideration was that if the colliding vessel was to blame in whole or in part no salvage could be

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(8) [1938] A. C. 136.

(9) L. R. 3 A. & E. 534.

(10) [1938] A. C. 153.

(11) Ibid. 147.

(12) [1926] A. C. 655, 664.

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recovered by the owners of the salving vessel if both are in the same ownership. This is emphatically negatived. We think that the passages cited dispose of para. 4 of the defence.

The question of avoiding circuity of action, as put forward in para. 5, raises a different issue. As Lord Wright points out, the fact that the owners recovering salvage are also owners of a vessel to blame for the collision will affect the ultimate destination of the salvage award. The amount that has to be paid for salvage is an item in the damage claim by the salved vessel against the vessel that is in whole or in part to blame for the collision. In *The Kafiristan* (13), the owners of the *Kafiristan* would be entitled to recover three-quarters of the salvage paid to the Canadian Pacific Railway as owners of the *Beaverford* in their claim against the Canadian Pacific Railway as owners of the *Empress of Britain*. In a case where the blame is only partial, as Lord Wright says (13): “. . . the fixing of the salvage remuneration would seem to be a necessary step in setting off the items of damage on the one side or the other so as to ascertain the final balance of account”. But here, at the time of the salvage proceedings, it had been settled that the *Nea Hellas* was wholly to blame. We will disregard for the moment the fact that the proceedings in respect of the collision were not against the plaintiffs here, and that in any event different departments of the Crown were involved. Lord Wright considered the position if the colliding vessel was wholly to blame. He said (13): “If the other colliding vessel is solely to blame, the owner of the salved vessel, which is blameless, will bring into his account of damages the whole sum awarded to the salving vessel for salvage. It may be that in such a case a salvage award in favour of the shipowners is superfluous and need not be made on the principle of circuity of action, but the responsibility for the collision is mostly ascertained after the salvage award is made, and in any case there may be questions of limitation of liability”.

In the present case we were told that questions of limitation of liability do, or may, arise. We were told that the limit in respect of the *Nea Hellas* was about 120,000*l.* If the other heads of damage were, say, 110,000*l.*, the position would be as follows. The claim by the owners of the *Susan V. Luckenbach* would be for 110,000*l.*, plus 24,700*l.* Of this only 120,000*l.* would be paid. In other words, the owners of the *Susan V. Luckenbach* would be out of pocket 14,700*l.*

This is plainly what their position would have been if the salving and colliding vessels had been in different ownership. It is suggested that the result is unjust. It does not seem so to us;

but, in any case, it seems to us to follow from the ratio decidendi of *The Kafiristan* (14). We have in mind, in particular, the passage cited, in which Lord Wright refers to the joint ownership as irrelevant to the usefulness and meritorious character of the services actually rendered.

The expression "circuitry of action" is not one which has been, so far as we know, precisely defined. In the present context, we agree with what Bucknill, J., said in *The Kafiristan* (15): "But circuitry of action can only be pleaded when the rights of the litigants are such that the defendants would be entitled to recover back from the plaintiffs the same amount of damages which the plaintiffs sought to recover from the defendants". Where the amount of the salvage award takes the damage claim for the collision above the limit of liability, this is clearly not the case.

In the present case counsel for the salvors also relied on the fact that the plaintiffs here were not the defendants on the record in the collision action. This seems to us a good point. In some Crown cases it might be a technical point, but it may be that, if different departments of the Crown are concerned, it would be right that they should not be treated as identical parties. It appears that if the Crown could have been sued through its appropriate department in respect of the *Nea Hellas*, the Ministry of Transport and not the Admiralty would have been the defendants.

We agree, therefore, with the judge that circuitry of action does not arise here. He doubted whether it ever could arise. We think that if the plaintiff owner of the ship claiming salvage was the defendant in the collision action, in which his ship was held alone to blame, and no question of limitation of liability arises, it may well be, as Lord Wright said, that an award in his favour in the salvage action would be superfluous.

We were referred to the other cases discussed in Lord Wright's speech in *The Kafiristan*, but there is nothing that we wish to add upon them. In our opinion the appeal must be dismissed.

Appeal dismissed.

Solicitors: *Ince & Co.; Treasury Solicitor.*

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(14) [1938] A. C. 136.

(15) [1936] P. 63.

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Collingwood,
J.

Husband and wife—Marriage settlement—Variation—Meaning of settlement—Property in both names—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192.

A wife's father purchased a freehold property after her marriage, expressly directing that the title deeds should be completed in her name. A few years later, for no stated consideration, she conveyed a half share in the property to the husband in order that, as a freeholder, he might be more likely to be accepted as a naturalized British citizen. The house was not the matrimonial home. On an application by the wife, after her marriage had been dissolved in proceedings in which she was the innocent party, for a variation of settlement in respect of the property, the objection was taken on behalf of the husband that the conveyance of the half share to him was not a post-nuptial settlement within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and so could not be upset.

Held, that, although the conveyance was of part of a house which was not the matrimonial home, it was executed by the wife for the purpose of making provision for her husband because he was her husband, and with a view to the continuance of the matrimonial relations between them; that the conveyance came within the wide meaning which had been given to the word "settlement" in the authorities in which applications for variation had been considered; and that the conveyance in question was accordingly a post-nuptial settlement which the court had jurisdiction to vary.

Smith v. Smith, [1945] W. N. 104; 61 T. L. R. 331, followed.

APPLICATION for variation of a settlement.

The wife applicant and the respondent were married in March, 1942, and in November, 1942, the wife's father purchased a freehold property in Scotland in the name of the wife, expressly directing that the title deeds should be completed in her name. In July, 1945, the wife, for no stated consideration, conveyed a half share in the property to the husband. The wife stated in an affidavit that this was done at the husband's request so that he could hold the property jointly with her and thus have a better opportunity of becoming a naturalized British subject.

In February, 1950, the wife filed a petition for divorce, and on March 31, 1950, she was granted a decree nisi which was made absolute in May, 1950. She applied for the deed of conveyance to be varied, and the question arose whether it constituted a "post-nuptial settlement" within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925.*

* Now s. 25 of the Matrimonial Causes Act, 1950.

The registrar held (with reluctance) that the husband was right in contending that it was not; but, as there was also an application by the wife for maintenance and a secured provision, he ordered the husband to pay 200*l.* a year, less tax, to be secured by a charge on the whole of the property in question and also in part upon other property. He referred in his report to a similar course taken in *Chalmers v. Chalmers* (1). He further made a nominal order for maintenance in favour of the wife for their joint lives.

H. D. Baskerville (*Marshall-Reynolds* with him) for the wife.
Emrys Roberts for the husband.

The arguments are sufficiently indicated in the judgment.

Cur. adv. vult.

Dec. 21. COLLINGWOOD, J., reading his judgment, stated the facts and continued:—There is no precise definition of the term “post-nuptial settlement”. In *Prinsep v. Prinsep* (2), Hill, J., held that, in deciding whether a settlement comes within the purview of the section, the material question is: “Is it upon the husband in the character of husband, or on the wife in the character of wife, or upon both in the character of husband and wife. If it is, it is a settlement on the parties within the . . . section. The particular form of it does not matter. It may be a settlement in the strictest sense of the term, it may be a covenant to pay by one spouse to the other, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state”.

The case most strongly relied on by counsel for the husband was *Hubbard v. Hubbard* (3). In that case a husband executed a deed by which he assigned to a trustee a leasehold house on trust to assign the same at once to the wife absolutely; and the trustee assigned accordingly. It was held by the Court of Appeal, reversing the decision of Sir Francis Jeune, P., that the assignment was not a “settlement” in any sense; that it could not therefore be a settlement within s. 5 of the Matrimonial Causes Act, 1859; and that the court had no jurisdiction to vary its provisions. In his very short judgment, Rigby, L.J., said (4): “I am inclined to say that the decision of the learned President himself in *Chalmers v. Chalmers* (5) is directly in point, and is to be preferred to his decision in the present case”.

(1) (1892) 68 L. T. 28.

(2) [1929] P. 225, 232.

(3) [1901] P. 157.

(4) *Ibid.* 161.

(5) 68 L. T. 28.

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In *Chalmers v. Chalmers* (5), the wife petitioner had, some twenty years before the date of the decree, assigned to her husband certain property of which she then stood possessed subject to mortgages. The President held "that the assignment was not a 'settlement' within the meaning of the Act, but that, upon a petition by the wife for maintenance, the court could order, and did order, the respondent to secure to the petitioner, by way of maintenance, the property which she had formerly assigned to him, subject to outstanding mortgages". The same view and the same course were taken by the registrar in the present case.

The matter was again considered by the Court of Appeal in *Bosworthick v. Bosworthick* (6). There a wife, married in 1897, executed in 1902 a bond whereby she secured to her husband an immediate annuity for his life. The marriage was dissolved in 1925 on the petition of the wife, who applied for an order for discharge of the bond. It was contended on behalf of the husband that a bond for payment of an annuity was not a "settlement". It was held "that a liberal interpretation according to their obvious purpose must be given to s. 5 of the Matrimonial Causes Act, 1859, and s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, and that although the bond did not involve the settlement of property, or a charge on property, for successive interests, it nevertheless amounted to a post-nuptial settlement within the meaning of those sections, and that the court had power, consequent upon the dissolution of the marriage", to discharge the bond.

Lord Hanworth, M.R., after pointing out that no light was thrown on the meaning of "settlement" in the section from looking at other Acts concerned with the settlement (for instance the Bankruptcy Acts), said (7): "It is not unimportant to see that at a very early stage, within a few years of the passing of the Act of 1859, Lord Penzance, referring to s. 5 of that Act, said in *Stone v. Stone & Brownrigg* (8): 'I am not prepared to say that the separation-deed was not a post-nuptial settlement within the meaning of that section; undoubtedly property was settled, and I think the section should be liberally construed'".

Lord Hanworth, M.R., also referred to *Dormer v. Ward* (9), in which the Court of Appeal held that a covenant to pay a yearly sum constituted settled property the disposition of which could be varied under the Act, and rejected the argument that the covenant merely created a debt, and he continued (10): "if we were to hold that there was no jurisdiction in the present case,

(5) 68 L. T. 28.

(6) [1927] P. 64.

(7) *Ibid.* 68.

(8) (1864) 3 Sw. & Tr. 372, 373.

(9) [1901] P. 20.

(10) [1927] P. 64, 71.

" I think that we should be running counter to the decision of this court in *Dormer v. Ward* (9), which we cannot do. On consideration of the authorities, the ground of my decision is that the section is to be construed liberally and widely, and I do not intend to narrow the meaning of the word 'settlement'."

Scrutton, L.J., said (11): " About what we might have done if there had been no authority on this point, I decline to speculate, but I think that the ordinary Chancery barrister would have recoiled from the proposition that a deed containing a covenant to pay 300*l.* per annum was a settlement of property. There are a series of decisions in the Divorce Court to show that a much wider meaning has been given to the word 'settlement' than it has received in equity."

Romer, L.J., said (12): " I do not think we get any assistance from the Settled Land Act or the Bankruptcy Act, or from the way in which the word 'settlement' is usually employed by conveyancers. What we have to do is to consider the meaning of the word in these particular sections. We have had numerous authorities cited to us going as far back as 1861, and amongst them an authority which is binding on this court, and in my judgment those authorities establish that where a husband has made a provision for his wife, or a wife for her husband, in the nature of periodical payments, that amounts to a settlement within the meaning of the sections. That may appear to be a very liberal construction of the sections, but I think that it is no more liberal a construction than should be given to them having regard to the obvious purposes for which they were enacted by the legislature."

In *Gunner v. Gunner & Stirling* (13), by the terms of an insurance policy effected by the husband on his life, the payees were identified as the person or persons entitled under the Married Women's Property Act, 1882, to receive the policy moneys, and the insurance was effected under the provisions of that Act for the benefit and separate use of the wife of the assured absolutely. The marriage was subsequently dissolved by reason of the wife's adultery and the husband sought to vary the provisions of the policy.

It was contended on his behalf that the effect of the policy was to create a trust in favour of the wife absolutely on the death of her husband; that it gave her an immediate vested interest in the policy moneys; and that, while it was not a "settlement" in the strict sense, it was one within the meaning of s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. For the wife it was contended that it was a gift and not a settlement.

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(9) [1901] P. 20.

(11) [1927] P. 64, 71.

(12) *Ibid.*, 72.

(13) [1949] P. 77.

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Wallington, J., held "that a trust had been created whereby the wife as main beneficiary was given an immediate vested interest in the rights under the policy; that the policy had been effected to make provision for the wife in her character of a wife; and that the court had the necessary jurisdiction under s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, to vary the policy in question as being a post-nuptial settlement".

The judge in his judgment considered *Chalmers v. Chalmers* (14), *Hubbard v. Hubbard* (15), and *Brown v. Brown* (16), which were the three cases principally relied on by counsel for the husband in the present case. He said (17): "In *Chalmers v. Chalmers* (14), the first of these cases, there was an absolute assignment of property subject to mortgage or mortgages. Sir Francis Jeune, P., in his judgment, used this phrase (18): 'A settlement means the settlement of property subsisting between husband and wife, and the Act gives power to alter or vary when, and only when, the relation of husband and wife have [*sic*] ceased to subsist. The power to dispose of it absolutely does not seem to be the test'. That was a case in which the court had to hold that it could not be said that there was a settlement variable under the section for the reason that there was a complete and completed assignment by the wife to the husband, and, therefore, the property having entirely passed the transaction could not be regarded as a settlement of property within this section. In *Hubbard v. Hubbard* (15), the husband had assigned to a trustee a leasehold house and some furniture on trust absolutely, and the trustees assigned the same accordingly. The wife having obtained a decree of nullity the Court of Appeal held that the assignment was not a settlement within the provisions of this section. *Brown v. Brown* (16) was a case in which a wife had purchased an annuity and the society granting the annuity had covenanted to pay the annuity to the husband or his assigns. The wife had parted with her money and there was no possibility of anything coming back to her under the terms of the transaction, and the court held that that could not be a settlement within the meaning of this section".

This decision was followed and applied in *Bown v. Bown & Weston* (19), where, in consideration of a single premium paid by a husband, a life assurance company issued a policy whereby they undertook to pay a certain sum on his death. The wife of the assured was specified as the beneficiary during her life-

(14) 68 L. T. 28.

(15) [1901] P. 157.

(16) [1937] P. 7.

(17) [1949] P. 77, 89.

(18) 68 L. T. 28, 29.

(19) [1949] P. 91.

time. Wallington, J., held that the policy, which was issued for the benefit of the wife in her character of a wife, was a post-nuptial settlement within the meaning of the section, although there was no trust, the policy not being issued under s. 11 of the Married Women's Property Act, 1882.

The case principally relied on in support of the wife's case was *Smith v. Smith* (20). The facts are set out in the judgment of Denning, J., in these words (20): "On November 6, 1929, the parties married. On November 4, 1933, a house was bought in their joint names. They lived in it as their home and brought up their three children there. On October 11, 1943, the husband presented a petition of divorce against his wife, and on February 8, 1944, he was granted a decree nisi. On August 16, 1944, a decree absolute was pronounced dissolving the marriage. The wife is still in the house. The husband wants possession of it. To that end he says that it is the subject of a 'post-nuptial settlement' within s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. The wife says that it is not.

"In point of law the purchase of the house was a joint affair. The conveyance was taken in the joint names of husband and wife. They entered jointly and severally into covenants with the vendor restricting the use of it. The greater part of the purchase price was raised from a building society on a mortgage of the house by which husband and wife were jointly liable for the repayments and for performance of the covenants. The moneys for the purchase were provided solely by the husband, who paid off the mortgage by instalments, the final repayment being in February, 1940.

"The conveyance expressly defined the interests of husband and wife in much the same way as would otherwise be imported by statute from the fact that it was taken in their joint names. The house was expressly conveyed to the husband and wife 'in fee simple as joint tenants', and it was expressly stated that they were to stand possessed of it 'upon trust to sell the same with power at discretion to postpone any sale' and to stand possessed 'of the net proceeds of sale' and 'of the net rents and the profits until sale in trust for the husband and wife as joint tenants beneficially'. The result was that the husband and wife held a joint tenancy of the legal estate in the land (which could not be severed), and an equitable joint tenancy in the income of the land pending sale and of the proceeds eventually arising from the sale (which could be severed by taking appropriate steps).

"The presumption is that the interest of the wife was

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"intended by the husband as an advancement by him. So long
 "as husband and wife were living in the house together, they, of
 "course, shared the occupation and acquiesced in a postpone-
 "ment of sale, and if they had continued in that way till one
 "died, the survivor would take the whole legal and beneficial
 "interest in it. If they together let or sold the house, either of
 "them could sever the equitable joint tenancy in the income or
 "proceeds, whereupon each would be entitled to one-half. No
 "letting or sale could, however, be effected by one without the
 "consent of the other, except by order of the Court of Chancery,
 "which would consider whether in the particular circumstances
 "it was right and proper that such an order should be made.
 "Neither party has yet applied for such an order, for in these
 "days of housing shortage it is no doubt better to have the house
 "than the money.

"Mr. Seuffert submitted that the provision of the house was
 "for the future benefit of both the spouses and was a 'settle-
 "ment'. He relied on *Bosworthick v. Bosworthick* (21) and
 "*Prinsep v. Prinsep* (22). Mr. Latey submitted that it was
 "a gift to the wife of a half-share in the house and was not a
 "'settlement'. He relied on *Hubbard (otherwise Rogers) v.*
 "*Hubbard* (23) and *Brown v. Brown* (24).

"I find it difficult to reconcile the decisions in *Hubbard v.*
 "*Hubbard* (23) and *Brown v. Brown* (24) with the principle that
 "runs through the rest of the cases on this subject. That
 "principle, as I understand it, is that where a husband makes a
 "continuing provision for the future needs of his wife, in her
 "character as a wife, which is still continuing when the marriage
 "is dissolved, the provision is a 'settlement' which can be
 "brought before the court to see whether the provision should
 "continue now that she has ceased to be a wife. The same
 "applies to a provision by a wife for her husband, or by each or
 "either for both. The provision usually takes the form of
 "periodical payments either with the intervention of trustees, as
 "in an ordinary marriage settlement, or without them, as in a
 "separation deed or a bond; but it may take other forms.

"The transfer of an investment into a wife's name, whether
 "it be a house, or shares or an annuity, seems to me to be in its
 "nature just as much a continuing provision for her future needs
 "as is a periodical payment. The fact that it is made for no
 "consideration other than natural affection, and is in that sense
 "a gift, does not mean that it is not a 'settlement'. The bond
 "securing the annuity in *Bosworthick's Case* (25) was in that

(21) [1927] P. 64.

(24) [1937] P. 7.

(22) [1929] P. 225.

(25) [1927] P. 64.

(23) [1901] P. 157; see also 84

L. T. 441.

“sense a gift. Again, the fact that it is assignable does not mean that it is not a ‘settlement’. A wife is often free to assign her interest under an ordinary marriage settlement or a separation deed, but it is none the less a ‘settlement’. If she should assign her interest, the court might treat the proceeds in her hands as representing the property; and a co-respondent, or indeed any person, who takes an assignment from her with notice that proceedings are pending as to the application of the property will find that the arm of the court is long enough to reach the property in his hands.

“Neither *Hubbard v. Hubbard* (26) nor *Brown v. Brown* (27) directly covers this case. This freehold house was a continuing provision for the future needs of both husband and wife in their character as such. Neither could dispose of it without the consent of the other except by taking proceedings in Chancery. Applying the principles I have stated, I think it was a ‘post-nuptial settlement’.”

In my opinion the present case comes within the test laid down by Denning, J., and within the wide and liberal meaning of the term “settlement” in s. 192 of the Act of 1925 to be derived from all these cases. The conveyance by the wife to the husband was for the purpose of making a provision for him, not, it is true, in respect of the matrimonial home, but for the purpose of providing him with a “house”. I do not think that, when Denning, J., spoke of a “house”, that was restricted to the matrimonial home. It was, I think, a conveyance by the wife to the husband because he was her husband, and with a view to the continuance of the matrimonial relations between them; and it constituted a “settlement” which can be brought before the court to decide whether the provision made by it should continue now that he has ceased to be her husband.

In my opinion it is a post-nuptial settlement within the meaning of s. 192 according to the principles which have been laid down in the cases to which I have referred.

Judgment accordingly.

Solicitors: *Digby & Co.*; *H. S. L. Polak & Co.*

J. B. G.

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Wallington, J. *Husband and wife—Divorce—Variation of settlement—Interests of children—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 191, sub-s. 1, s. 192.*

If it be equitable and proper that an innocent husband's powers under a marriage settlement should be accelerated by a variation of that settlement consequent on the dissolution of the marriage, and if in consequence of that variation it is essential that something should be done to protect the interests of the children of the marriage, that protection should not be provided by the innocent husband, but from the funds, if any, of the guilty wife.

In a proper case an application that a guilty wife be ordered under s. 191, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, to settle such property as the court may think reasonable for the benefit of the children of the marriage may be entertained at the same time as an application to vary a marriage settlement.

A marriage was dissolved by reason of the wife's adultery, and the husband made application to vary a post-nuptial settlement, to which both parties had contributed substantial sums. It was provided in that settlement (1.) that the trustees should hold the income of the wife's fund on protective trusts for the benefit of the wife during her life and after her death on protective trusts for the benefit of the husband if surviving during the residue of his life, but so long only as he was a widower or there were infant children of the marriage living; (2.) that the survivor might appoint from his or her fund to an after-taken wife or husband or the children of a subsequent marriage a proportion of his or her fund subject to a maximum of one-third. The husband made application in respect of (1.) that the words "unmarried" should be substituted for the word "widower", and, in respect of (2.) that he should be permitted to exercise his powers of appointment during the lifetime of the wife, while her powers should be restricted to a future husband married by her after his death, and to the children or issue of the children of such marriage as might be born after his death. He further applied to have the rights, powers and interests of the wife in his fund extinguished absolutely as if she had died at the date of the decree absolute: that application was not opposed by the wife.

In addition to his application to have the settlement varied as above, the husband asked the court to order, in pursuance of its powers under s. 191, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, that the wife should settle a sum of money for the benefit of the children of the marriage.

Held, (1.) that the children's interests should not be considered in isolation, but should be one of the considerations taken in conjunction with all the considerations affecting a question of this

nature; (2.) that the variation prayed might prove (as to (1.) and (2.)) to be inimical to the interests of the children in certain circumstances; (3.) that it was in the circumstances of the case just and equitable that the husband's powers should be accelerated as asked; and (4.) that, since in consequence of that acceleration it was necessary to protect the children's interests, and since it would not be right that the innocent husband should provide that protection, the guilty wife should vest in trustees the sum of 5,000*l.* (or investments to that value) to be held on trust to pay the income to the wife during her life, and after her death in trust as to both capital and income for the children of the marriage.

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VARIATION of settlement.

The parties were married in 1940 and by a post-nuptial settlement dated March 17, 1941, they both brought in considerable funds. There were two children of the marriage born respectively in 1942 and 1943. The husband was granted a decree nisi in July 1949, on the ground of the wife's adultery with the co-respondent, and the marriage was finally dissolved in September, 1949. Application was then made to vary the settlement.

By cl. 4 (b) of the settlement, it was provided that the trustees should hold the income of the wife's trust fund "for the benefit of the wife during her life and after the death of the wife to hold the income on protective trusts for the benefit of the husband if surviving during the residue of his life but so long only as he is a widower or there are infant children of the marriage living". Application was made by the husband to substitute in this clause for the word "widower" the word "unmarried".

By cl. 5 it was provided that the survivor of the spouses might appoint from his or her fund to an after-taken husband or wife, or the issue of a subsequent marriage, a proportion of his or her fund subject to a maximum of one-third of that fund. Application was made that the husband be permitted to exercise his powers under this clause during the lifetime of the wife, and that the wife's powers under the clause be restricted to a husband married after the death of the husband and to such children or issue as might be born after his death.

The husband also asked that the wife's rights, powers and interests in his fund should be extinguished as if she had died at the date of the decree absolute. He further prayed the court to order the wife to settle 5,000*l.* upon herself for life and after her death for the children of the marriage. Reliance was placed

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on s. 191, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 (1).

The registrar, by his report, submitted that the settlement should be varied as follows:—

“(1.) That the wife’s rights, powers and interests in the husband’s fund be extinguished as if she were dead;

“(2.) That the husband be permitted to exercise his powers under cl. 5 of the settlement during the lifetime of the [wife];

“(3.) That the [wife’s] powers under cl. 5 of the settlement be restricted to a husband married after the death of the [husband] and such children or issue as may be born after his death”.

He expressed the view that any loss which the children might suffer by the extension of the husband’s powers under cl. 5 would be compensated by leaving the word “widower” and not substituting “unmarried” in cl. 4 (b). He was not prepared to accede to the request for a settlement of the wife’s property, expressing the view that the children were satisfactorily provided for and that to order additional security from the wife, so that the husband might be in a better position, appeared to offend against the principle in *Maudslay v. Maudslay* (2), that “culpable as the conduct of the respondent has been my functions are not to punish him for it but merely to prevent as far as I may think just and practicable, the petitioner being damaged in a pecuniary sense by the dissolution of the marriage”.

The husband applied that that report should be varied by the substitution of “unmarried” for “widower” in cl. 4 (b), and for a settlement of the wife’s property. [A further application, concerning costs, is referred to in the judgment.]

J. E. S. Simon for the husband.

Victor Williams for the wife.

R. L. Bayne-Powell and *John B. Gardner* for the children.

O. Swingland for the trustees.

WALLINGTON, J., referred to the registrar’s report and continued:—The first recommendation made by the registrar is that the wife’s rights, powers and interests in the husband’s fund be

(1) Supreme Court of Judicature (Consolidation) Act, 1925, s. 191, sub-s. 1 (now s. 24, sub-s. 1 of the Matrimonial Causes Act, 1950): “If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any

“property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or any or either of them”.

(2) (1877) 2 P. D. 256, 261.

extinguished as if she were dead. That is not and could not be opposed by anybody. It is an ordinary and proper order to make by way of variation of the settlement, and accordingly I adopt that recommendation.

His second recommendation is that the husband be permitted to exercise his powers under cl. 5 of the settlement (which relates to the appointment of part of the funds in favour of an "after-taken" wife and the children of a marriage with that "after-taken" wife) during the lifetime of the wife. If that matter stood alone, I should have no difficulty, for it would be just and equitable that those powers should be varied in the manner indicated in the recommendation. Mr. Simon has also invited the court to vary cl. 4 (b) of the settlement by substituting the word "unmarried" for "widower", and to make a consequential amendment or variation in cl. 4 (c).

On behalf of the wife, Mr. Williams has challenged Mr. Simon's application upon several grounds. It is also objected to by counsel appearing for the children on the same and one or two additional grounds—and mainly on the ground that the interests of the children would suffer, although Mr. Simon argues that its only effect would be to express what the parties must have intended when they made the settlement. It is not impossible, as I see it, that if I made that variation it might prove to be inimical at some point of time and in some circumstances to the interests of the children. Mr. Simon submits that a single matter of that sort ought not to be dealt with in isolation, but that the interests of the children should be one of the considerations taken in conjunction with all the considerations that affect a question of this kind.

I think that that last submission is right. To use language that I hope will not be capable of misunderstanding, my view is that the interests of the children must have a very high place, and in relation to some circumstances perhaps the highest place or priority, when the court comes to consider the application to vary in the several ways in which that application is framed.

I have indicated my view on the second of the variations which the registrar has recommended. There is no doubt that the adoption of that recommendation will prejudice the interests of the children to the extent of any proportion of the trust fund that may be appointed by the husband under the power of appointment, as the proportion appointed will be taken out of the funds settled for their benefit. The settlement allows such an appointment after the death of one of the spouses, but the variation sought and recommended by the registrar would give the husband the right to appoint during the life-time of the wife. It would only be by limiting in amount the proportion of the funds which can be so appointed that the interests of the children

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can to the extent of that limitation be preserved. But the earlier the time at which the appointment could be made under cl. 5 the earlier would the children's interests be interfered with, and the longer the period during which the income of the appointed portion of the funds removed from the children.

That is a matter of considerable importance. Mr. Williams presses me not to risk any further possible interference with the children's interests by substituting the word "unmarried" for the word "widower". It is agreed that the second recommendation in the report is bound up with this other application for variation, i.e., the substitution of one word for the other. The conclusion at which I have arrived on this part of the case is that I ought to make the variation by the substitution of one word for the other, that being a matter affecting only the rights of the two spouses directly. It seems to me that the possibility of injury to the interests of the children arising out of that variation is so remote that I ought not to pay any serious attention to it now.

The effect of this variation will be to involve further amendments in that part of the settlement of one kind or another, and eliminating the possibility that any part of the funds either income or capital may be left for a period undisposed of, the settlement must be varied as may be required for those purposes. If the parties can agree under competent advice as to the necessary amendments or variations, well and good; but if they cannot agree, or if there is any uncertainty in the minds of either of them, then the variation for this purpose must be settled by one of the conveyancing counsel of the court.

I consider now the effect of the second of the recommendations, i.e., the acceleration of the powers of appointment. Mr. Simon has agreed that this variation calls for some protection of the children's interests, and asks for an order that the respondent wife do settle securities up to 5,000*l.* upon herself for life and after her death for the children of this marriage upon the trusts usual in such a case.

That application is made under s. 191 of the Supreme Court of Judicature (Consolidation) Act, 1925. I entertain no doubt that in a proper case such a settlement may be ordered, and that it may be determined at the same time as an application to vary the settlement. If it is just and equitable that the husband's powers of appointment should be accelerated, such acceleration will be inimical to the interests of the children. In my opinion, therefore, the children's position must be safeguarded.

Would it be right for me, for the purpose of providing such a safeguard, to direct such a settlement as Mr. Simon on his application invites me to order? If it is just and equitable, and if it is reasonable and proper that the husband's powers should

be accelerated, and if, consequently, it is essential that something should be done for the protection of the children's interests, it cannot be right that the innocent petitioner should provide that protection. If it is to be provided it can only be provided out of the funds of the wife, if she has any. It has not been disputed that she has funds which can be made available for that purpose, and, in my opinion, part of them ought to be so used.

I adopt, therefore, and make an order in accordance with, recommendations (1.), (2.) and (3.) of the registrar. I also, as I have said, order the variation of the settlement in cl. 4 (b) by substituting the word "unmarried" for the word "widower" with the consequential variations in cl. 4 (c) of the settlement and indeed in any other portions of the settlement which may apparently be affected and be capable of misunderstanding and fail in effect unless they be made. These orders ought to be specified, for the sake of clarity. They are as follows:—(1.) That the wife's rights, powers and interests in the husband's fund be extinguished as if she were dead; (2.) that the husband be permitted to exercise his powers under cl. 5 of the settlement during the lifetime of the wife; (3.) that the wife's powers under cl. 5 of the settlement be restricted to a husband married after the death of the petitioner and such children or issue as may be born after his death.

On the application on the part of the husband I order that the wife do vest in trustees the sum of 5,000*l.* or investments to that value to be held by the trustees in trust to pay the income to the wife during her life and after her death in trust both as to capital and income for the children of the marriage, and that a deed giving effect to this trust and to any consequential trusts as to the regulation of the income and the disposition and final disposition of the capital be settled by one of the conveyancing counsel of the court in the event of the parties failing to agree as to its terms.

With regard to costs the registrar submits that the costs of the trustees and the children be paid by the wife and that the petitioner pay his own costs.

[After argument on costs his Lordship ordered:] Costs of the trustees and the infant children and of the husband to be paid by the wife, and, in default, to be paid out of the wife's fund. If there is any income the costs to be paid out of income, if there is not any income then the costs must be paid out of capital.

Solicitors: *Charles Russell & Co.; Thompson, Quarrell & Megaw; Potheary & Barratt; Farrer & Co.*

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Husband and wife—Marriage settlement—Variation—Interests of child—Variation in favour of children by future marriage—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 192.

In considering whether to vary a marriage settlement by allowing the husband to withdraw some portion of his fund, which would otherwise go to the child of the marriage under the settlement, so that he may make provision, should the occasion arise, for a future wife or children, the court will regard as one of the relevant considerations the effect that a refusal of the husband's request might reasonably have upon an existing satisfactory relationship between himself and his child.

A husband brought into a marriage settlement a large fund which represented substantially all that he possessed, and was of about twice the value of the wife's fund. The settlement provided that the income of the husband's fund should go to him for his life, then to the wife for her life, and thereafter to the children or remoter issue of the marriage, the husband and the wife having a joint power of appointment. There were corresponding provisions in respect of the wife's fund. On the dissolution of the marriage on the ground of the husband's adultery, application was made to the court by both parties to vary the settlement. Each applied that the rights, powers and interests of the wife in the husband's fund, and of the husband in the wife's fund, should be extinguished; and the husband asked also that he might be at liberty to revoke the trusts of the settlement relating to a moiety of his fund and to appoint that moiety, or a part of it, to an after-taken wife or the issue of a later marriage. The husband had already consented to a generous order for the maintenance of the only child of the marriage. The application in respect of the moiety was opposed on behalf of the child on the ground that the original settlement did not allow the husband to settle funds even on a wife taken after the decease of his first wife, so that, subject to the appointment to remoter issue, the child's interest had vested. It was further contended that the husband's request was detrimental to the child and ought to be wholly refused, since the proposed variation produced no corresponding benefit for the child.

Held, (1.) that the removal of the life interests in the funds would itself be a substantial benefit to the child: *Whitton v. Whitton* [1901] P. 352, applied; (2.) that were the husband's request to be refused, he would, were he to marry again, have very little to settle on any future spouse or children, so that the refusal might seem unjust and impair the satisfactory relationship between father and child which at present existed; (3.) that such a result would cause a loss to the child which the retention of the money would not compensate, and that the happier result which would be produced by the surrender of some part of the husband's fund would be a

benefit to the child; (4.) that, although in some cases financial stringency might compel the court to disregard such a benefit, in the circumstances a fair amount for the husband to remove would be two-fifths of his fund.

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APPLICATION for variation of a settlement.

The parties were married in 1939, and by a marriage settlement entered into the day before the marriage both brought in substantial funds, the husband's share being twice that of the wife. There was one child of the marriage, which was dissolved by decree absolute on January 14, 1949, on the ground of the husband's adultery.

By the settlement, the income of the wife's fund was to go to the wife for her life, then to the husband for his life, and thereafter to the children or remoter issue of the marriage, both parties jointly having a power of appointment. The husband's fund consisted of certain reversions of which the income, when they fell in, was to go to the husband for his life, and then to the wife for her life. Thereafter the fund was to go to the children or remoter issue. There was a similar power of appointment.

Both parties made application to the court for a variation of the settlement. Both applied that the rights, powers and interests of the wife in the husband's fund should be extinguished as if she had died on the date of the decree absolute, and made corresponding application in the case of the wife's fund. No dispute arose upon those matters.

The husband, however, made further application that he should be at liberty to revoke the trusts of the settlement relating to one moiety of the husband's fund, and to appoint that moiety, or any part of it or interest in it to an after-taken wife and/or the issue of any future marriage. The husband was under forty years of age at the hearing of the application.

It was upon this last matter that argument arose, counsel for the child contending that the original settlement did not allow the husband to settle funds even on a wife taken after the decease of his first wife, so that, subject to the appointment to remoter issue, the child's interest had vested, and should not be disturbed. He further contended that the husband's request was detrimental to the child and ought wholly to be refused, since the proposed variation produced no corresponding benefit for the child.

In March, 1949, an order was made by consent whereby the husband was to pay 220*l.* a year free of tax towards the maintenance of the child until she was twenty-two years old.

Alastair Morton for the wife.

S. E. Karminski, K.C., and *R. J. A. Temple* for the husband.

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H. V. Brandon for the child and for the trustees of the settlement.

The arguments are sufficiently indicated in the judgment.

PEARCE, J. [after referring to the facts]. The parties all agree that the registrar's report should be confirmed so far as it extinguishes the rights, powers and interests of the husband in the wife's fund as if he had died in the wife's lifetime, and also in so far as it extinguishes the rights, powers and interests of the wife in the husband's fund as if she had died in the husband's lifetime. The parties also agree with the registrar's submissions on the appointment of new trustees.

They disagree on the submission of the registrar that the court should grant the husband's request that he should be at liberty to revoke the trusts of the settlement relating to a moiety of his fund and to appoint that moiety or any part of it to any after-taken wife or issue of any marriage. Counsel argues that it is fair to allow the husband to do this because of the following considerations: the child will have a reversion to the whole of the wife's fund, since the child can now have no brothers or sisters to share it with her, and also to the similar sum which will, if the husband's request be granted, remain in the husband's fund. This reversion is subject to an appointment by the husband in favour of the child's own children, which is possible, but not probable; the child also has a reversion on the wife's death to a further sum under another settlement, which will, however, be shared equally by the future children, if any, of the wife; the child also, he contends, has expectations from the wife's side.

The wife herself has considerable capital, and the wife's father is well-to-do, but he has three children other than the wife, and he has five grandchildren. The child also has the benefit of a consent order against the husband of 220*l.* free of tax for the child's maintenance until she is twenty-two years of age. Further, the child, I am told, receives the tax allowance in respect of this. The husband contends that this is a more generous order than the court would have made and that it lasts for longer than a court order could have lasted had he not consented. He says, though this is disputed, that this order was made while the question of variation was under consideration, and should be taken into account as a benefit accruing to the child when the question of variation is considered.

Against this, counsel for the child argues that no benefit to the child that is not part of this actual variation of the settlement should be taken into account, and that the original settlement does not allow the husband to settle funds even on a

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wife taken after the decease of his first wife; so that, subject to the appointment to remoter issue, the child's interest had vested, and should not be disturbed. He also argues that the husband's request is a detriment to the child, and that it ought to be wholly refused, since no corresponding benefit for the child is produced by the proposed variation. He takes the further point, though it was not taken below, and though he admits that on the cases it cannot be successfully taken in this court, that I have no power to grant the husband's request. By s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925 (1), this court "... may make such orders with reference to the application " of the whole or any part of the property settled either for the " benefit of the children of the marriage or of the parties to the " marriage, as the court thinks fit . . .". The discretion so given by statute is a wide one. It must, of course, be used in accordance with the settled general principles that have been laid down from time to time.

Various cases have been cited, but, though they are helpful in showing the general principles, it is to the facts of this particular case that I must apply my discretion. It seems clear from the cases cited, and also from unreported cases in which a similar relief has been granted, that I have power to grant the husband's request if on the facts it is just to do so. The words of Hill, J., in *Prinsep v. Prinsep* (2), which have been cited with approval in more than one case, are helpful in considering this question. He said: "The main object of variation is to make " proper provision for the injured spouse and the children of the " marriage. And prima facie, settlements ought not to be inter- " fered with further than is necessary for that purpose. But the " court which has annulled the marriage must not only protect " the injured party, but also be fair to the wrong-doing party".

The child's expectations on the maternal side do not weigh with me: she had those in any event. Moreover, it is quite reasonable to suppose that any wife whom the husband may marry in the future will be as well-to-do as the first wife, and that any child born of such a marriage will have as good expectations on the maternal side as this child has. The generous nature of the husband's maintenance of the child does not weigh with me, though it is right that it should be put before the court as part of the general picture. A generous father may reasonably hope to receive a more sympathetic hearing than one who has no regard for his paternal liabilities. But I must protect the interests of the child, and I must be satisfied that justice requires

(1) Now s. 25 of the Matrimonial Causes Act, 1950. (2) [1929] P. 225, 236.

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the proposed variation, and that it benefits, or at the very least does nothing to the disadvantage of, the child.

In this case the proposed variation will remove one of the two life interests that stand between the child and her reversion to the mother's fund. The removal of this life interest is a substantial benefit: see per Sir Francis Jeune, P., in *Whitton v. Whitton* (3). The proposed variation will also remove one of the life interests that stand between the child and so much of the husband's fund as is left in the settlement after the variation. The husband tells me that he is prepared to appoint to the child (as opposed to any remoter issue) all that remains in the husband's fund. The effect of this will be that although probably the child would have received this benefit in any case, she is now assured that the funds in the husband's fund will come to her and will not be appointed to her children. Since this gives her now the certainty of receiving that reversion, it is of considerable value.

It is, in my view, to the child's interest in another respect to allow the husband to remove a part of his fund from the settlement. He brought into the settlement reversions that were substantially all that he possessed; he now has, apart from these funds, no expectations and very little property; if, as seems likely in view of his age, he remarries, he has extremely little to settle on any future wife or children. If I refuse his request and devote exclusively to this child all the money that came from him, allowing none of it to go to any future wife or child of his, it may quite reasonably give him a feeling of injustice and impair the satisfactory relationship between father and child, a relationship of whose existence his generous dealing with the question of her maintenance gives some indication. Moreover, in the eyes of fair-minded members of the family, or friends, and of the child herself when she grows up, such an order will probably seem unjust and an excessive preference of the child's interests to those of her father. To produce this result would cause a loss to the child which the retention of the money would not compensate. To produce a happier result by the surrender of some part of the husband's fund would, in my view, be a benefit to the child. There may be cases where financial stringency might compel one to disregard such a benefit, owing to the necessity of keeping every available penny for the child, but this is not such a case.

In my view it is reasonable and just that the husband should be granted his request, in part. However, a moiety is rather too large a portion for the husband to remove from the fund, and

the fair amount is two-fifths. With this variation I confirm the report, subject to the husband's appointing the remaining three-fifths of the husband's fund to the child.

Solicitors: *Braby & Waller; Pickering, Kenyon & Co.; Neish, Howell & Haldane.*

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Husband and wife—Alleged wilful neglect to maintain—Application to High Court—Existing deed of separation—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 25.

In June, 1932, a husband and wife entered into a deed of separation, the husband covenanting (if certain stipulations were observed) to pay such sum as after the deduction of income tax would amount to and leave the net yearly sum of 156*l*. These payments were regularly made. The wife covenanted to support and maintain herself out of that provision and out of her separate estate, or otherwise. In December, 1949, the wife asked the husband to increase the amount payable under the deed of separation. The request was refused, and she took out a summons in the High Court for increased maintenance, alleging that her husband had wilfully neglected to provide reasonable maintenance for her. She further asked the court to order the husband to secure such payments as might be ordered.

The husband stated in his affidavit that he relied upon the deed and upon the wife's covenants in it whether by way of estoppel or otherwise. It was conceded that since the date of the deed the husband's financial position had materially improved, while that of the wife, who was suffering from spinal arthritis, had deteriorated.

Held, that, despite the change in the respective positions of the parties the husband, who had faithfully carried out the terms of the deed, could not be held guilty of wilful neglect to maintain, which imports some element of matrimonial misconduct.

Observations of Lord Merrivale, P., in *Diggins v. Diggins*, [1927] P. 88, 92, applied.

ORIGINATING SUMMONS by way of application for increased maintenance.

The applicant wife, and the respondent husband, were married in 1916. There were no children. On July 14, 1931, Langton, J., dismissed a petition by the husband for a decree of nullity of marriage on the ground of incapacity, and on June 30, 1932, the parties entered into a deed of separation.

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By cl. 3 of that deed, the husband covenanted (if certain stipulations were observed) to pay during his life "to the wife " during her life (if he should live so long) for her separate use " without power of anticipation such a sum as after deduction " of income tax shall amount to and leave the clear net yearly " sum of 156l. . . .". The wife covenanted to support and maintain herself out of that provision and out of her separate estate or otherwise.

There was no clause in the deed by which the wife undertook not to take any proceedings for maintenance in any future proceedings.

There was no resumption of cohabitation after the deed had been executed, and the husband continued to make regular payments in accordance with its provisions.

After the deed was executed, however, the husband's financial position materially improved, while that of the wife, who had become an invalid suffering from spinal arthritis, had deteriorated; and it was suggested for the wife that, were the court to consider the respective means of the parties for the purpose of making an order, such an order would, on the customary calculations, provide for maintenance of over 1,000l. a year less tax.

In December, 1949, the wife by her solicitors wrote to the husband asking him to increase the amount payable under the deed. The request was refused, and in 1950 the wife took out an originating summons under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1949, (now s. 23 of the Matrimonial Causes Act, 1950) (1) on the ground that her husband had wilfully neglected to provide reasonable maintenance for her. She further asked the court to order the husband to secure such payments as might be ordered. In his affidavit the husband said that he relied upon the deed and upon his wife's covenants in it "whether " by way of estoppel or otherwise".

John Latey for the wife. While the deed provides evidential value in assessing any award of maintenance, the husband's

(1) Matrimonial Causes Act, 1950, s. 23, sub-s. 1: "Where a husband " has been guilty of wilful neglect to " provide reasonable maintenance for " his wife or the infant children of " the marriage, the court, if it would " have jurisdiction to entertain pro- " ceedings by the wife for judicial " separation, may, on the application " of the wife, order the husband to " make to her such periodical pay- " ments as may be just; and the " order may be enforced in the same " manner as an order for alimony in

" proceedings for judicial separation".

Sub-s. 2: "Where the court " makes an order under this section " for periodical payments, it may, if " it thinks fit, order that the husband " shall, to the satisfaction of the " court, secure to the wife the " periodical payments, and for that " purpose may direct that a proper " deed or instrument to be prepared " by all necessary parties shall be " settled and approved by one of the " conveyancing counsel of the court".

present income is such that what he is paying is not reasonable. He has, in addition, sufficient capital to lead the court to say that it is a proper case for some secured provision. When the deed was entered into, the only remedy open to the wife in the circumstances would have been to obtain an order in a court of summary jurisdiction, where the maximum weekly order was then 2l., and where there was no jurisdiction to make an order for secured provision. The Law Reform (Miscellaneous Provisions) Act, 1949, s. 5 (now s. 23 of the Act of 1950), remedied an injustice to wives in such cases, and there is therefore a very important difference in the present position. [He referred to *Morton v. Morton* (2); *Dewe v. Dewe* (3); *Snowdon v. Snowdon* (3); *Iles v. Iles* (4); *Matthews v. Matthews* (5); *Diggins v. Diggins* (6); and *Hyman v. Hyman* (7).]

R. J. A. Temple for the husband. Where a husband has faithfully and punctually paid the maintenance due under a deed, he cannot be said to have wilfully neglected to provide reasonable maintenance. [He referred to *Baker v. Baker* (8).]

BARNARD, J. Until the passing of the Law Reform (Miscellaneous Provisions) Act, 1949, the jurisdiction in respect of wilful neglect to provide reasonable maintenance was one limited to justices and metropolitan magistrates and stipendiary magistrates under the Summary Jurisdiction Acts; and they only had a limited jurisdiction in respect of the amount that they could order a husband to pay if they found him guilty of that offence. This court is now entitled to deal with that offence, and it has a completely unlimited jurisdiction as regards amount. Further, the court is also given jurisdiction, if it thinks fit, to direct that any payment which it thinks should be made by a husband found guilty of a wilful neglect to provide reasonable maintenance should be secured. It is quite clear from the words of sub-s. 2 that the court in all cases has a discretion whether it should order security or not.

[His Lordship referred to the facts and continued:] It is conceded on the evidence that since that deed was entered into the husband's financial position has materially improved. The wife's financial position has deteriorated, and she is also, to some extent, an invalid, because she is suffering from spinal arthritis. In those circumstances, coupled with other reasons which Mr. Latey has put forward, she now says that, although the husband has paid what he covenanted to pay regularly—there is no

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- (2) (1942) 111 L. J. (P.) 33.
- (3) [1928] P. 113.
- (4) (1931) 47 T. L. R. 396.
- (5) [1932] P. 103.

- (6) [1927] P. 88.
- (7) [1929] A. C. 601.
- (8) [1950] W. N. 29; 66 (Pt. 1) T. L. R. 81.

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question of any default—she is now, in the light of these new circumstances, entitled to more, and that, in view, too, of the fact that the Act of 1949 came into existence, not only is she entitled to a larger amount than she could have obtained before by way of reasonable maintenance, but also, if the court thinks fit, she is entitled to have the payments secured.

I have been referred to a large number of authorities including *Diggins v. Diggins* (9); *Dewe v. Dewe* (10); *Snowdon v. Snowdon* (10); *Matthews v. Matthews* (11); and, finally, *Morton v. Morton* (12). Certainly in *Diggins v. Diggins* (9) it was clear that the husband had stopped all payments under the deed. It is true that he sought to justify that by saying that the wife was molesting him and that he was therefore justified in not making the payments; but it was clear when he came before the court that he was not justified in not making the payments.

In *Snowdon v. Snowdon* (13), both were guilty parties who had entered into a separation agreement, and the husband went bankrupt. The wife proved the deed in the bankruptcy, and all she got was of course some small dividend; and, so far as the covenant was concerned, it came to an end. In those circumstances the wife took out a summons on the ground of wilful neglect to provide reasonable maintenance; and once again the answer was simple: the husband was not in fact paying reasonable maintenance, and an order was made accordingly.

In *Matthews v. Matthews* (11), the wife covenanted not to sue in consideration of a lump sum; but Lord Merrivale, P., stated that he saw no cause for estoppel of the application for maintenance; it was merely something of evidential value, which must vary in each case. In that case it had very little value, because the wife would get very little benefit from it.

The present case is, however, a little different. It is more like *Morton v. Morton* (12), where the wife took out a summons against her husband on the ground of wilful neglect to provide reasonable maintenance, and the parties came to an agreement. Heads of agreement were drawn up under which the husband agreed to pay to the wife a small fixed sum; and, according to the evidence, the husband continued to pay under the heads of agreement. But the wife later took out another summons. The court held that on the facts the husband could not possibly be found guilty of wilful neglect to maintain. Lord Merriman, P., agreed with the view expressed by Lord Merrivale, P., in *Jones*

(9) [1927] P. 88.

(10) [1928] P. 113.

(11) [1932] P. 103.

(12) 111 L. J. (P.) 33.

(13) [1928] P. 113.

v. *Jones* (14) that there must be some element of matrimonial misconduct.

I myself have to try to find of what matrimonial misconduct in this particular case the husband has been guilty. He has faithfully carried out the terms of the deed. He has made his wife an allowance with which she was perfectly satisfied at the time. In the light of the present-day cost of living she is not now satisfied with it; but can I possibly hold that this husband has been guilty of some matrimonial misconduct? I do not think that I can possibly do so. If I were to accede to the argument put forward by Mr. Latey it would not be safe for any parties to enter into an agreement. What Mr. Latey is seeking on behalf of the wife is the best of two worlds: he wants to say that the wife is at liberty to come to the court and get the amount varied. If parties enter into an agreement it may be that in some circumstances the wife will benefit in the long run, so the maintenance remains at that fixed amount. If, on the other hand, the husband's means increase, that cannot be helped. That is the amount which he agreed to pay, and which the wife agreed to accept, and so the matter stands.

With regard to this summons, a passage in Lord Merrivale, P.'s judgment in *Diggins v. Diggins* (15) seems most appropriate. The passage reads as follows (16): "It must not be supposed that "there is an unlimited right in a wife under the amended statute, "wherever she has entered into a deed, at her volition to proceed "to the justices to get the terms of the deed reviewed. That "would be contrary to good sense, and I do not doubt, if any "case arise where a wife who has entered into a deed proceeds "in disregard of it to seek something different from the justices, "that she will meet with an answer which will prevent the "possibility of any further question".

On the facts before me I find it impossible to hold that this husband has been guilty of wilful neglect to provide reasonable maintenance, and in those circumstances the wife's summons must be dismissed.

Application refused.

Solicitors: *Peacock & Goddard; Hyde, Mahon & Pascall.*

J. B. G.

(14) (1929) 142 L. T. 168, 169,
referred to in Lord Merriman, P.'s
judgment in *Morton v. Morton*, 111
L. J. (P.) 33, 34.

(15) [1927] P. 88.
(16) *Ibid.* 92.

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Nov. 6, 7;
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Pilcher and
Collingwood,
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Husband and wife—Wife respondent's application for rehearing—Undeclared petition heard by judge alone—Decree made absolute—No notification of hearing—Desire to defend—Ignorance of procedure—No error of court alleged—Matrimonial Causes Rules, 1947, St. R. & O. 1947 (523 L/9), r. 36 (1)—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49), s. 31, sub-s. 1 (e).

It is not competent to a party to apply to the Divisional Court under r. 36 of the Matrimonial Causes Rules, 1947, for the rehearing of a suit when the decree nisi has been made absolute in circumstances of procedural regularity.

A husband's petition for divorce was duly served on the wife, who failed to forward to the registrar a memorandum of appearance in accordance with the procedure stated in that memorandum, although she wished to deny the allegation of desertion contained in the petition. It appeared that she had either handed or sent it to the secretary of a poor persons' committee, through whom she had made an unsuccessful application for a poor person's certificate. Owing to her failure to comply with the instructions the (district) registrar was ignorant of her wish to appear and defend the case; and, since she had not entered an appearance, she was not notified of the date when the case was to be heard. Having learnt through the local newspaper that her husband has been granted a decree nisi of divorce she consulted solicitors who informed the King's Proctor of the position, alleging inter alia that the husband had had intercourse with the wife during the period of desertion on which the petition was based, which had not been disclosed to the court. Reference was also made to certain orders against the husband which had been made by a court of summary jurisdiction which the husband had also failed to disclose to the court. The King's Proctor replied that more evidence would be required before he could intervene, and there was, in fact, no intervention.

Some time after the decree nisi had been made absolute, and after the eventual discharge of an existing maintenance order, the wife applied to the Divisional Court for a rehearing of the petition.

Held, that there was no authority for the contention that the court had jurisdiction to rescind the decree absolute in such a case, where it had not been suggested that the decree absolute was a nullity either by reason of a failure to comply with statutory requirements which were conditions precedent to the right to a decree, or by reason of a procedural irregularity which caused a failure of natural justice.

Prince v. Prince, ante, p. 71, *Woolfenden v. Woolfenden*, [1948] P. 127, *Everitt v. Everitt*, [1948] W. N. 237; 65 T. L. R. 121, distinguished.

Per curiam: Inasmuch as the Court of Appeal has jurisdiction in an appropriate case to entertain an appeal after decree absolute,

the jurisdiction of the Divisional Court to entertain such an appeal would appear to be excluded.

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APPLICATION for rehearing of a petition for divorce.

On December 11, 1947, the husband filed a petition for divorce in the Newport (Mon.) district registry on the ground of his wife's desertion. On December 19, 1947, the petition was served on the wife by registered post, and on December 29, 1947, she completed and forwarded to the honorary secretary of a Poor Persons' Committee a form of application to be permitted to defend the suit as a poor person. The acknowledgment of service and the two duplicate forms of memorandum of appearance were apparently handed or sent to the secretary by the wife. No form of appearance was in fact sent to the registrar in accordance with the procedure stated in the memorandum of appearance. On February 18, 1948, the wife received a letter stating that her application for a poor person's certificate had been refused.

It was stated in an affidavit sworn by the wife in support of this application that she had said in the memorandum of appearance that she intended to answer the petition, and that she thought that nothing more would be done until her defence had been seen to. She had, she said, no money to pay a solicitor to take up her case. The next information she received was when she read in a local paper dated May 15, 1948, that her husband had been granted a decree nisi on May 6, 1948.

Owing to her failure to comply with the instructions in the memorandum of appearance the district registrar was ignorant of her wish to appear and defend the case. Since she had not entered an appearance she was not notified of the date when the case was to be heard.

When she learnt of the decree nisi the wife consulted solicitors (not those acting for the wife in these proceedings), who wrote on June 9, 1948, to the King's Proctor stating the position. They referred to certain maintenance orders, as set out below, and alleged that the husband had had intercourse with the wife during the period of desertion on which the petition was based, which had not been disclosed to the court. The King's Proctor replied that more evidence would be required before he could intervene. The wife also wrote to the commissioner who had tried the case, who replied stating that he could not discuss the matter.

The wife stated in her affidavit that the husband had failed to disclose to the court certain maintenance orders which had been made by the justices on her application, namely, a finding in 1939 of constructive desertion of the wife by the husband, an interim order in April, 1940, following a short resumption of cohabitation, an order in May, 1940, on the ground of persistent cruelty and wilful neglect to provide reasonable maintenance, and

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a variation of that order in May, 1941. There was a resumption of cohabitation after the order of May, 1941; in September, 1942, a further order (which was referred to in the petition) was made, on the ground of wilful neglect to provide reasonable maintenance. The acts of marital intercourse which were referred to in the letter to the King's Proctor were alleged to have taken place during frequent visits by the husband to the wife's house between the order of September, 1942, and September, 1945, when the wife finally refused to have anything further to do with the husband.

The wife also alleged in her affidavit that the husband had been associating with another woman since 1942. The order of 1942 was still in force when the decree nisi was pronounced, and was apparent from the divorce petition. The decree nisi was made absolute on June 18, 1948.

On July 5, 1948, the husband applied to the justices for revocation of the order of 1942, but the application was refused. He again applied in 1949, when the order was varied by reducing the amount payable. A further application to have the order discharged was made in October, 1949. The justices again refused, and the husband appealed to the Divisional Court. His appeal was allowed on December 15, 1949, by Lord Merriman, P., and Pearce, J.

Neither party had married again since the decree absolute.

The Divisional Court was moved on behalf of the wife for leave to apply out of time for the rehearing of the undefended suit; and, if leave should be granted, to set aside the decree nisi and decree absolute and to order a rehearing. It was not suggested that any error was made by the commissioner who adjudicated upon the suit.

William Latey, K.C., for the wife. Having regard to the suppression of material facts by the husband at the hearing, the disclosure of which might have resulted in evidence for the wife being called by the court, but more especially to the failure to bring before the court her statement of defence, it is submitted that the court, on a substantial line of precedents, would have no difficulty in rescinding the decree nisi if it had not been made absolute. The wife's delay in making the present application might well be excused in view of her letter to the commissioner and to the King's Proctor and the fact that until a more recent date she was without proper legal advice.

The question has been raised whether the decree absolute can be set aside, and whether such a decree can be upset by the Divisional Court under r. 36 of the Matrimonial Causes Rules,

1947 (1). It is clear that there was no error of the court at the hearing of the cause, and dicta in *Everitt v. Everitt* (2) suggest that, although in that case it was the Court of Appeal which set aside the decree absolute, on the ground that the respondent had not been served with the petition, the appellant might properly have applied to the Divisional Court under r. 36.

Lord Merriman, P., said in *Everitt v. Everitt* (3): "In dealing with cases under r. 36 the Divisional Court has always been careful to avoid any semblance of trespassing on the exclusive jurisdiction of the Court of Appeal . . . although if the Divisional Court is satisfied that a case comes within the rule it is bound to deal with it. . . . On the face of it, therefore, it might seem that r. 36 covers this case. But there are two further points for consideration. First, whether, after a decree has been made absolute it is appropriate to describe an application to set it aside as an application for re-hearing; or, in other words, whether r. 36 applies at all after a decree has been made absolute; and, secondly, however that may be, whether s. 31 (1) (e) of the Supreme Court of Judicature (Consolidation) Act, 1925, does not give a substantive right of appeal to the Court of Appeal from a decree absolute. . . . In my opinion this appeal from the decree absolute is placed by the legislature in a class by itself and is permitted whenever the statutory condition is fulfilled and not otherwise . . .".

Lord Merriman, P., also referred in that case (4) to *Woolfenden v. Woolfenden* (5), where a judge sitting alone reversed on motion a decree absolute which had been obtained in circumstances of procedural irregularity. The President added (4): "No precedent has been found for an application under r. 36 after decree absolute. In my view it is unnecessary for the purposes of this case to decide whether either of these alternative methods of setting aside this decree absolute would have been open to the husband; and any opinion on the point would therefore be obiter". The President therefore left open this question of jurisdiction. It was observed in *Prince v. Prince* (6) that if a respondent is precluded from appealing to the Court of Appeal because he has not appeared in the suit, and is precluded from

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(1) The Matrimonial Causes Rules, 1947, r. 36: "(1) An application for re-hearing of a cause heard by a judge alone where no error of the court at the hearing is alleged shall be made to a Divisional Court of the Probate Division. The application shall be by notice of motion (2) Any other application for re-hearing shall be made by way of appeal to the Court of Appeal". Rule 36 of the 1950 Rules is the same, except that "Divorce and Admiralty" is added between "Probate" and "Division".

(2) [1948] W. N. 237, 345; 65 T. L. R. 121.

(3) 65 T. L. R. 121, 123.

(4) *Ibid.*, 124.

(5) [1948] P. 27.

(6) *Ante*, 71, 83.

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asking the Divisional Court for a rehearing because he cannot say that the court has not made an error at the hearing, it would seem that his remedies would be to obtain the intervention of the King's Proctor or of a bona fide member of the public. But since in the present case no error of the court is alleged, it is submitted that the wife must surely be entitled to a rehearing, and that *Everitt v. Everitt* (7) is no direct authority to the contrary.

In *Peek v. Peek* (8) it was suggested that one of the objects of r. 36 was to enable the court to secure a trial of the real issue between the parties before permitting an appeal to the Court of Appeal. If the wife had a right of appeal to the Court of Appeal in the present case (which, it is submitted, she has not) that tribunal would have to consider fresh evidence.

The rule does not preclude an application for a rehearing where there has been a decree absolute: it refers merely to causes "heard by a judge alone". The reality of the matter, in referring to an application to set aside a decree absolute, is whether natural justice has been done: see, e.g., *Marsh v. Marsh* (9).

David Rowland for the husband. It is conceded that it would have been difficult in the circumstances of this case to resist the wife's application for a rehearing had it been made before the decree had been made absolute. Two and a half years have now, however, elapsed since decree absolute; and it is submitted that the position is very different.

It was held in *Prince v. Prince* (10) that "r. 36 was intended, "or ought to be treated as having been intended, to give or pre-serve to a Divisional Court . . . the right to order a new trial or "a rehearing in cases in which the parties themselves would not "in the ordinary course be entitled to go to the Court of Appeal". In *Everitt v. Everitt* (11) Lord Merriman, P., said: "In dealing "with cases under r. 36 . . . the Divisional Court has always "been careful to avoid any semblance of trespassing on the "exclusive jurisdiction of the Court of Appeal . . . ; although if "the Divisional Court is satisfied that a case comes within the "rule it is bound to deal with it . . . because no other court can do so".

It must therefore, it is submitted, follow from this that if the Court of Appeal can deal with a case, the Divisional Court cannot. *Everitt v. Everitt* (11) decided that an appeal lies to the Court of Appeal after decree absolute under s. 31, sub-s. 1 (e),

(7) [1948] W. N. 237, 345; 65
T. L. R. 121.

(8) [1948] P. 46, 61.

(9) [1945] A. C. 271, 284.

(10) Ante, 71, 85.

(11) [1948] W. N. 237, 345; 65
T. L. R. 121, 123.

of the Supreme Court of Judicature (Consolidation) Act, 1925. That being so, the jurisdiction of the Divisional Court is excluded after a decree is made absolute. Once a decree is made absolute a spouse can appeal under the sub-section to the Court of Appeal if he or she has not "had time or opportunity to appeal from the "decree nisi". If he has had time and opportunity, he cannot appeal at all. It is because the wife in this case is on the facts thus debarred from going to the Court of Appeal that she seeks to set up an alternative jurisdiction in the Divisional Court.

Support for the view that jurisdiction in this court is now ousted may be found in the judgment of Lord Merriman, P., when the parties were before the Divisional Court on December 15, 1949, when the husband successfully appealed against the justices' refusal to discharge the wife's maintenance order (12).

A decree absolute has only been set aside in two reported cases—*Woolfenden v. Woolfenden* (13) and *Everitt v. Everitt* (14). Both are clearly to be distinguished from this case. In both, the decree absolute was a nullity, as what should have been done inter partes was done ex parte, without the knowledge of the other party. In *Everitt v. Everitt* (14) the petition was never served on the respondent. In the present case it was duly served on the wife, who by her own fault failed to take the proper steps with the forms served on her. In such a case she cannot contend that the decree was a nullity.

Regard must also be had to the necessity of avoiding uncertainty with regard to re-marriage. Section 184, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 (15), provides for the re-marriage of either party after the decree is made absolute. Here the decree was made absolute two and a half years ago, and the husband might well have wished to re-marry, which, it appears, is in fact the case.

Latey, K.C., in reply.

Cur. adv. vult.

Nov. 27. PILCHER, J., reading his judgment, referred to the facts and continued:—It is not suggested that there was any error on the part of the commissioner in granting the husband a decree nisi upon the evidence placed before him, in what was, on the face of the papers, an undefended case in which no appearance had been entered. It is in my opinion equally clear upon the undisputed facts, as they are now known, supplemented by the affidavit evidence of the wife, which for this purpose must

(12) This decision is referred to in the judgments post, pp. 237 and 243-4.

(13) [1948] P. 27.

(14) [1948] W. N. 237; 65 T. L. R. 121.

(15) Now replaced by s. 13, sub-s. 1, of the Matrimonial Causes Act, 1950.

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be taken to be accurate, that this is a case in which this court would have had little hesitation in rescinding a decree nisi and ordering a new trial if application had been made under r. 36 of the Matrimonial Causes Rules, 1947, before a decree absolute had been pronounced. In this connexion I need only refer to the case of *Peek v. Peek* (16).

In the present case, however, we are invited by the notice of motion to order a rehearing of this divorce suit, and as a necessary incidental to such an order to rescind not only a decree nisi, but a decree absolute. A decree absolute is a judgment in rem affecting the status of the parties. From the moment when it is pronounced either party to the dissolved marriage may, subject to any right of appeal, re-marry, and it is purely fortuitous that the husband in the present case has not re-married.

In *Kemp-Welch v. Kemp-Welch & Crymes* (17), Sir Samuel Evans, P., held that he had no jurisdiction to rescind a decree absolute on the motion of a co-respondent in the suit even on the ground that the verdict and decree nisi had been obtained by fraud.

Counsel were only able to refer us to two decided cases in which the rescission of a decree absolute once pronounced had ever been ordered. In *Woolfenden v. Woolfenden* (18) the husband, against whom his wife had obtained a decree nisi, applied through his solicitors to the Divorce Registry for a decree absolute, and obtained a certificate that the decree nisi had been made absolute. This application was made before the earliest date upon which it was competent for the party against whom the decree nisi had been obtained to make such an application under s. 9 of the Matrimonial Causes Act, 1937. The application made in the registry was moreover defective in form, and no notice of it was served upon the wife. In those circumstances Barnard, J., held that the decree absolute so obtained was a nullity.

In *Everitt v. Everitt* (19) a husband applied by motion to the Court of Appeal for leave to appeal against a decree absolute obtained by his wife, notwithstanding that the time for appeal had expired. The hearing of the motion was, by consent, treated as the hearing of the appeal. The husband's case was that he had never been served with the petition in the suit. The Court of Appeal invoked the assistance of the King's Proctor on the question whether they had jurisdiction, in the particular circumstances, to hear the appeal. After it had become apparent that the question of the jurisdiction of the court to entertain the appeal could not be solved until it was ascertained as a matter

(16) [1948] P. 46; (C. A.) 66 (Pt.

(18) [1948] P. 27.

II) T. L. R. 503.

(19) [1948] W. N. 237, 345; 65

(17) [1912] P. 83.

T. L. R. 121.

petition in the suit, the Court of Appeal themselves heard evidence directed to this point, and found as a fact that it was not established that the husband had ever been served with the petition. In this state of affairs the court held that the husband was not debarred by the provisions of s. 31, sub-s. 1 (e), of the Supreme Court of Judicature (Consolidation) Act, 1925, from appealing against the decree absolute obtained by his wife, inasmuch as he had not had "time and opportunity to appeal from the decree nisi on which the order was founded". The court accordingly gave the husband leave to appeal out of time, allowed the appeal, ordered the decree nisi and decree absolute to be set aside, and directed a new trial.

In *Everitt v. Everitt* (20), the petition never having been served, the decrees obtained were mere nullities. The Court of Appeal was satisfied that there had been no error on the part of the judge at the trial, and in the course of his judgment Lord Merriman, P., said (21): "On the face of it, therefore, it might seem that r. 36 covers this case. But there are two further points for consideration. First, whether, after a decree has been made absolute it is appropriate to describe an application to set it aside as an application for a rehearing; or, in other words, whether r. 36 applies at all after a decree has been made absolute; and, secondly, however that may be, whether s. 31, sub-s. 1 (e), of the Supreme Court of Judicature (Consolidation) Act, 1925, does not give a substantive right to appeal to the Court of Appeal from a decree absolute". Later, after setting out the provisions of that section, he says: "This provision, read positively, must mean that appeal will lie from an order absolute for the dissolution of marriage by a party who has not appealed from the decree nisi because he has not had the time and opportunity to do so. Manifestly the lack of time and opportunity to appeal from the decree nisi may be due to a failure to serve the petition, so that the decree itself is a nullity—*Craig v. Kanssen* (22)—but this need not be so. For example, a respondent who has been served may not have received notice of the hearing to which he is entitled if he has entered an appearance; and this, in turn, may be due either to a failure to give notice or to some accidental miscarriage. Or a respondent who has actually defended the suit may meet with an accident or be stricken with illness before he has been able to appeal. It is unnecessary to multiply examples. It seems to me that the legislature, in imposing this condition on the right to appeal against a decree absolute, cannot have intended to qualify it with reference to the nature of the particular circumstances in which

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(20) [1948] W. N. 237, 345; 65
T. L. R. 121.

(21) 65 T. L. R. 123.
(22) [1943] K. B. 256.

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“ the lack of time and opportunity to appeal against the decree
 “ nisi arose. In my opinion, this appeal from the decree absolute
 “ is placed by the legislature in a class by itself and is permitted
 “ whenever the statutory condition is fulfilled and not other-
 “ wise ”.

After referring to s. 184, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 (which provides for the re-marriage of divorced persons), he says (23): “ It may be that
 “ the legislature intended that a decree absolute could only be
 “ set aside by appeal to the Court of Appeal, and that to avoid
 “ uncertainty in connexion with re-marriage, a motion to a judge
 “ under the inherent jurisdiction of the court and an application
 “ to the Divisional Court under r. 36 are alike ruled out ”.

This is apparently the first occasion on which the Divisional Court has been moved under r. 36 to order a rehearing of a suit after decree absolute. It is also clear by inference that the Court of Appeal has jurisdiction to entertain an appeal under s. 31, sub-s. 1 (e), even after decree absolute, when the party against whom the decree nisi has been made has not had time or opportunity to appeal against such decree. As Lord Merriman, P., points out in one of the passages which I have quoted above, there may be cases in which the party against whom the decree nisi has been pronounced, although served with the petition, has not received notification of the trial, and perhaps does not become aware that his case has been determined until after the decree absolute has been pronounced. The proceedings and the orders made in such circumstances could not be said to have been mere nullities, as in *Everitt v. Everitt* (24). Examples of cases of this type readily spring to the mind, in which it would be clear that there had been no error on the part of the judge and in which the party against whom the decree nisi had been pronounced could successfully move the Divisional Court for a rehearing under r. 36, provided that no decree absolute had been pronounced. The learned President in the passage I have quoted above questioned whether it is appropriate to describe an application to set a decree absolute aside as an application for a rehearing, but he left the point open, as it was not necessary to decide it in *Everitt v. Everitt* (24).

We were supplied with a transcript of the judgment delivered on December 15, 1949, by the Divisional Court on the husband's appeal in the present case against the magistrates' refusal to discharge the maintenance order made in his wife's favour. At that hearing the Divisional Court were supplied with some at least of the information which we had before us as to the facts of the case. In the course of his judgment in that case Lord

(23) 65 T. L. R. 121, 123-4.

(24) [1948] W. N. 237, 345; 65 T. L. R. 121.

Merriman, P., referred to the various courses which might be open to the wife, as follows: "We are told that there were circumstances . . . which might conceivably . . . have led this court to listen sympathetically to an application under r. 36 of the Matrimonial Causes Rules, 1947, to set aside a decree nisi. And although, of course, I am expressing no sort of opinion as to what would have happened if a prompt application had been made to the Court of Appeal after the pronouncement of the decree nisi, for by that time, of course, jurisdiction in this Division is ousted, and still less any sort of opinion about what may happen if any such application is now made to the Court of Appeal . . .". In the above passage it is probable from the context that the word "nisi" is an error for "absolute". Later in his judgment he said: "Either this woman does or does not make an application to the Court of Appeal to set the decree absolute aside". None of those observations by the learned President were necessary for the decision of the point before the court, and he made it clear that he did not express any concluded opinion as to what action, if any, was open to the wife in this case to get the decrees pronounced set aside.

It is clear that having been duly served with the petition the wife cannot hope to contend successfully that the decrees pronounced in her husband's favour are mere nullities. It is equally clear on the admitted facts that she cannot hope to contend successfully that she has a right to appeal to the Court of Appeal against the decree absolute under s. 31, sub-s. 1 (e), of the Supreme Court of Judicature (Consolidation) Act, 1925, because, on the admitted facts, she had abundant time and opportunity to appeal against the decree nisi if she had taken the appropriate steps. The case of *Meier v. Meier* (25) decided that the Court of Appeal has no power under its inherent jurisdiction to set aside a decree absolute obtained in circumstances of procedural regularity. It is equally clear that this court has no such power.

Whilst I feel some sympathy with the wife, I do not forget that she is largely the author of her own misfortunes, because she either failed to read, or, if she read, failed to comply with the instructions set out in the printed forms of memorandum of appearance and notice to appear. It was in the circumstances unfortunate that the King's Proctor, after receiving a full account of the facts, many of which are now in dispute, did not feel able to intervene. It was also unfortunate that the wife's solicitors did not, before the decree was made absolute, file a notice of motion for a rehearing under r. 36. None of these matters, however, have any bearing upon the point we have to decide.

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In the recent case of *Prince v. Prince* (26) the Court of Appeal, affirming a decision of a Divisional Court of this Division (27), decided that r. 36 of the Matrimonial Causes Rules, 1947, was intended or ought to be treated as having intended to give or preserve to the Divisional Court the right to order a new trial or rehearing in cases in which the parties would not in the ordinary course be entitled to appeal to the Court of Appeal. That case, of course, only dealt with the situation obtaining before the pronouncement of a decree absolute. If it be permissible to draw any inference from the decision in *Prince v. Prince* (28) as to what the situation might be after the pronouncement of decree absolute, it would seem that inasmuch as the Court of Appeal has jurisdiction in an appropriate case to entertain an appeal after decree absolute, the jurisdiction of this court to entertain such an appeal is excluded.

After careful consideration of all the authorities I am well satisfied that it is not competent to a party after the pronouncement of decree absolute to apply successfully to this court under r. 36 of the Matrimonial Causes Rules, 1947, for the rehearing of a suit in which a decree absolute has already been pronounced in circumstances of procedural regularity. The wife's application in this case will therefore be dismissed.

COLLINGWOOD, J., reading his judgment, referred to the notice of motion and continued:—It was conceded by counsel for the husband that had the wife applied to the court for a rehearing under r. 36 before a decree had been made absolute, it would have been difficult to contend that she would not have been entitled to succeed. Having regard to the contents of her affidavit as to merits, and the judgments in *Petty v. Petty* (29) and *Peek v. Peek* (30), I think this view was well founded. It was, however, contended on behalf of the husband that, since the decree had been made absolute, this court had no jurisdiction to make the order asked for.

The effect of a decree absolute, as affecting the right of a divorced person to re-marry, is set out in s. 184, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925 (31). [His lordship read the section and continued:] Further, by s. 31, sub-s. 1 (e): "No appeal shall lie from an order absolute for the dissolution of marriage in favour of any party who having had time and opportunity to appeal from the decree nisi on which the order was founded, has not appealed from that decree".

(26) Ante, 71.

(27) [1949] W. N. 402.

(28) Ante, 71.

(29) [1943] P. 101.

(30) [1948] P. 46; (C. A.) 66 (Pt. II) T. L. R. 503.

(31) Now replaced by s. 13, sub-s. 1, of the Matrimonial Causes Act, 1950.

The effect of a decree absolute was considered in *Crosland v. Crosland* (32). That was an application by the intervener to rescind a decree absolute after it had been pronounced by the judge in court, but before it had been filed in the registry, on the ground of the non-disclosure by the petitioner of his own adultery. Wallington, J., said (33): "I am quite satisfied . . . that when the judge in court has with his lips pronounced a decree absolute, there is an end of the matter, and that the steps which are taken subsequently to that pronouncement are merely ministerial acts which have no relation to the validity of the decree . . .". He continued (34): "The result . . . is that even though there may have been fraudulent concealment of vital facts throughout the whole of the proceedings of a petition, down to the very moment of the pronouncement of the decree absolute, when once the decree absolute has been pronounced the court is helpless; and the right of appeal is a limited right . . .". These observations must clearly apply with equal force to the effect of a decree which became absolute under r. 40 of the Matrimonial Causes Rules, 1947, upon the filing of the requisite notice of application in the registry.

The powers of the Court of Appeal in regard to setting aside a decree absolute were considered in *Meier v. Meier* (35). In that case a wife who had obtained a decree nisi obtained an order for security for her costs of an appeal by her husband, and the Court of Appeal directed that security should be provided by a specified date, and that in the event of failure by the appellant husband to provide such security, the appeal should stand dismissed. Owing to a mistake on the part of the appellant's solicitor, payment of the security was not made by the specified date, with the result that the appeal against the decree nisi stood dismissed, and in due course the decree was made absolute. The husband applied to the Court of Appeal to set aside the decree absolute, and reinstate the appeal.

In dismissing the application Scott, L.J., after referring to the sections of the Supreme Court of Judicature (Consolidation) Act, 1925, which I have quoted, said (36): "In my view the policy of Parliament requires that a decree absolute should be protected unless there is some ground on which the court concerned can properly exercise its inherent jurisdiction to intervene in order that justice may be done". Somervell, L.J., said (37): "The first question is whether the court has jurisdiction to deprive a party of rights lawfully acquired under an order of this court in circumstances of the most complete

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(32) [1947] P. 12.

(33) Ibid. 15.

(34) Ibid. 16.

(35) [1948] P. 89.

(36) Ibid. 93.

(37) Ibid. 94.

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“regularity on the part of the party whom the court is asked to
 “deprive of his rights. It is said that there is inherent juris-
 “diction to do this but I should want specific authority on the
 “point. There is no such authority and that fact weighs
 “very strongly against the submission that such a jurisdiction
 “exists. In principle I think it is impossible to imply such a
 “jurisdiction”, and Evershed, L.J., said (38): “The present
 “case is not merely concerned with the variation or the
 “modification of the form of an order as such, but relates to a
 “particular order under which, in the events which have
 “happened, a pending appeal properly stood dismissed and the
 “petitioner in the divorce proceedings acquired the status of a
 “person in whose favour a decree absolute for divorce had been
 “granted. To justify this court in taking the step of putting
 “back the clock would require something more than a variation
 “of its order under its inherent jurisdiction”.

In *McPherson v. McPherson* (39) the respondent wife sought to have decrees nisi and absolute which had been obtained against her by her husband (in Alberta) set aside on the ground (inter alia) that at the trial of the divorce the proceedings had not been held in open court, and that the resultant decrees nisi and absolute were null and void. It was held by the Judicial Committee of the Privy Council that the result of this irregularity in procedure was not to render the supervening decrees void, but voidable only, and that as the time for appealing against the decree absolute had expired, and further, that the petitioner had acquired a new status by re-marrying, the decree absolute, though originally voidable, had become unassailable. *Marsh v. Marsh* (40) is a further illustration of the principle that where there has been a defect in procedure which has not caused a failure of natural justice, the resulting decree is voidable only, and not wholly void.

In two cases only, apparently, has a decree absolute been rescinded. The first of them is *Woolfenden v. Woolfenden* (41). In that case the wife was granted a decree nisi on the ground of desertion. The husband applied for the decree to be made absolute, and his application failed to comply with r. 40, sub-r. 3, of the Matrimonial Causes Rules, 1947, under which it was made, in that there was no summons taken out, no notice whatever was served on the wife, and application was made before the expiration of the time required by s. 9 of the Matrimonial Causes Act, 1937. The wife moved the court to treat the making of the decree absolute as a nullity, and to set aside the certificate under the seal of the registry. In his judgment Barnard, J., after

(38) [1948] P. 89, 95.

(40) [1945] A. C. 271.

(39) [1936] A. C. 177.

(41) [1948] P. 27.

referring to *McPherson v. McPherson* (42) as an instance of irregularity in procedure which rendered the decree voidable only, said (43): "I have also been referred . . . to *Craig v. Kanssen* (44), which seems to me to be a case more in point. "In that case it was held that 'failure to serve process where 'service of process is required renders null and void an order 'made against the party who should have been served. The 'court can set aside such an order in its inherent jurisdiction, 'and it is not necessary to appeal from it'. Lord Greene, 'after citing a number of authorities, stated in the course of his 'judgment (45): 'Those cases appear to me to establish that a 'person who is affected by an order which can properly be 'described as a nullity is entitled *ex debito justitiæ* to have it 'set aside'.

"In view of the fact that the husband has not complied with 'the statute, I have come to the conclusion that I cannot treat 'the making of this decree absolute as a mere irregularity, and I 'must treat it as a nullity'; and the certificate was accordingly set aside.

The second of those cases was *Everitt v. Everitt* (46). That was an appeal by a husband respondent, on the ground that he had never been served with the petition. The appeal was out of time, and the Court of Appeal gave leave to appeal, treating the motion for leave as the hearing of the appeal, and themselves hearing evidence upon the issue as to service of the petition on the husband. They allowed the appeal, holding that as the husband had not appealed from the decree nisi because he had not had time and opportunity to do so, the Court of Appeal had jurisdiction to entertain his appeal under s. 31, sub-s. 1 (e), of the Supreme Court of Judicature (Consolidation) Act, 1925.

Lord Merriman, P., after stating the facts in the case, said (47): "It is well settled that a judgment obtained against 'a party in his absence owing to his not having been served 'with the process is not merely voidable for irregularity, but is 'void as a nullity: see *Craig v. Kanssen* (48) and the cases 'therein cited. Manifestly this general principle applies with full 'force to a judgment affecting the status of the party: *Marsh v. Marsh* (49). It is argued that in such a case the judgment is 'not the subject of an appeal at all, but that the proper method 'of getting rid of it is to apply to the court by which it was given 'to set it aside, under its inherent jurisdiction, as a nullity. 'This principle is said to be of universal application, but it is

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(42) [1936] A. C. 177.

(43) [1948] P. 27, 32.

(44) [1943] 1 K. B. 256.

(45) *Ibid.* 262.

(46) [1948] W. N. 237, 345; 65 T. L. R. 121.

(47) 65 T. L. R. 121, 122.

(48) [1943] 1 K. B. 256.

(49) [1945] A. C. 271.

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“ further argued that, in the case of a decree of divorce or nullity of marriage, whether it be a decree nisi or a decree absolute, the rules of court governing appeals provide, in a case such as this, that the application may be made only to a Divisional Court of the Probate, Divorce and Admiralty Division to the exclusion of the Court of Appeal, although it is conceded that this may not necessarily exclude recourse, by virtue of the court’s inherent jurisdiction, to a judge of the High Court or to any commissioner deemed to constitute a court of the High Court in accordance with s. 70 of the Supreme Court of Judicature (Consolidation) Act, 1925, having power to determine and try a matrimonial cause ”.

After quoting r. 36 of the Matrimonial Causes Rules, 1944, and referring to *Manners v. Manners and Fortescue* (50), *Petty v. Petty* (51) and *Peek v. Peek* (52), the President continued (53): “ On the face of it, therefore, it might seem that r. 36 covers this case. But there are two further points for consideration. First, whether, after a decree has been made absolute it is appropriate to describe an application to set it aside as an application for a rehearing; or, in other words, whether r. 36 applies at all after a decree has been made absolute; and, secondly, however that may be, whether s. 31, sub-s. 1 (e), of the Supreme Court of Judicature (Consolidation) Act, 1925, does not give a substantive right of appeal to the Court of Appeal from a decree absolute ”.

Having quoted the section in question, the President went on: “ This provision, read positively, must mean that appeal will lie from an order absolute for the dissolution of marriage by a party who has not appealed from the decree nisi because he has not had the time and opportunity to do so. Manifestly the lack of time and opportunity to appeal from the decree nisi may be due to a failure to serve the petition, so that the decree itself is a nullity—*Craig v. Kanssen* (54)—but this need not be so. For example, a respondent who has been served may not have received notice of the hearing to which he is entitled if he has entered an appearance; and this, in turn, may be due either to a failure to give notice or to some accidental miscarriage. Or a respondent who has actually defended the suit may meet with an accident or be stricken with illness before he has been able to appeal. It is unnecessary to multiply examples. It seems to me that the legislature, in imposing this condition on the right to appeal against a decree

(50) [1936] P. 117.

(51) [1943] P. 101.

(52) [1948] P. 46.

(53) 65 T. L. R. 121, 123.

(54) [1943] K. B. 256.

of fact whether the husband had or had not been served with the "absolute, cannot have intended to qualify it with reference to the "nature of the particular circumstances in which the lack of time "and opportunity to appeal against the decree nisi arose. In my "opinion, this appeal from the decree absolute is placed by the "legislature in a class by itself and is permitted whenever the "statutory condition is fulfilled and not otherwise". And, after referring to the provisions of s. 184, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, he continues: "It may be "that the legislature intended that a decree absolute could only "be set aside by appeal to the Court of Appeal, and that to avoid "uncertainty in connexion with re-marriage a motion to a judge "under the inherent jurisdiction of the court and an application "to the Divisional Court under r. 36 are alike ruled out.

"For a motion to a judge after decree absolute, and, indeed, "after re-marriage, there is a precedent in *Woolfenden v. Woolfenden* (55), but, as has already been seen, no precedent has "been found for an application under r. 36 after decree "absolute".

After the decree in this case had been made absolute the husband made application to the local justices to revoke the order for maintenance which his wife had obtained against him in 1942, and an application having been refused in October, 1949, he appealed to the Divisional Court. We have had the advantage of seeing the transcript of the judgment in that appeal, which was heard on December 15, 1949. In his judgment the President refers to the failure on the part of the husband to disclose in his petition the four appearances before the magistrates prior to that which he did disclose, which resulted in the order of 1942, and he went on to say: "But still the question remains, and this is the real "crux of this matter, whether all this has any real bearing on "the problem which we have to consider, because it had a very "great bearing on the validity of the decree nisi and its corresponding decree absolute, and we are told that there were "circumstances, namely, not the failure of service, because that "admittedly was effective, but circumstances in connexion with "her application for a poor person's certificate to defend the "divorce suit, which might conceivably—I say no more than "this—have led this court to listen sympathetically to an application under r. 36 of the Matrimonial Causes Rules to set aside "the decree nisi. And although I am expressing no sort of "opinion as to what would have happened if a prompt application "had been made to the Court of Appeal after the pronouncement "of the decree absolute" (for it is, I think, clear that the word "nisi" in the typescript is an error, otherwise the passage would

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be obscure) "for by that time, of course, jurisdiction in this Division is ousted, and still less any sort of opinion about what may happen if any such application is even now made to the Court of Appeal, the fact remains that at the present time this decree absolute on the ground of desertion, with all the implications which follow from a finding of desertion, stands"; and a little lower down in his judgment the President adds: "In my opinion really it boils down to this simple point: either this woman does or she does not make an application now to the Court of Appeal to set the decree absolute aside".

We were referred to the decision of the Court of Appeal in *Prince v. Prince* (56). This was an appeal from the decision of the Divisional Court (57) that that court had no jurisdiction to entertain an application for a rehearing under r. 36, where the petitioner alleged that after the dismissal of his petition new evidence had been discovered tending to show that his wife had committed adultery. The Court of Appeal held that r. 36 of the Matrimonial Causes Rules, 1947, "was intended, or should be treated as having been intended, to give or preserve to a Divisional Court . . . the right to order a new trial or a rehearing in cases in which the parties themselves would not in the ordinary course be entitled to go to the Court of Appeal. Accordingly, it was intended by the use of the words 'where no error of the court at the hearing is alleged', to exclude all cases in which an aggrieved party might seek, on application according to the ordinary general procedure of the Court of Appeal, to challenge as erroneous the conclusion of the judge at the hearing in the court below" (58).

I am unable to derive from the judgment of the Master of the Rolls in that case support for the contention that this court has jurisdiction to rescind the decree absolute in the present case. Here it is not suggested that the decree absolute was a nullity, either by reason of failure to comply with statutory requirements which were conditions precedent to the right to the decree, as in *Woolfenden v. Woolfenden* (59), or as being the result of a procedural irregularity which caused a failure of natural justice, as in *Everitt v. Everitt* (60). So far as procedural requirements on the part of the petitioner are concerned there is no ground for complaint. In my opinion, having regard to the judgments to which I have referred, there is no power in this court to set

(56) Ante, 71.

(59) [1948] P. 27.

(57) [1949] W. N. 402.

(60) [1948] W. N. 237, 345; 65

(58) See ante, pp. 71-2 and 84-5.

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aside the decree absolute and order a rehearing in the present case.

I agree that the application should be dismissed.

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Application dismissed.

No order as to costs.

Solicitors: *Gibson & Weldon, for D. J. Treasure & Co., Pen-
gam, Monmouthshire; Kinch & Richardson, for W. Ebsworth,
Bargoed, Glamorganshire.*

J. B. G.

SCOTT v. SCOTT.

1950
Dec. 11.

*Husband and wife—Wilful neglect to maintain—Application to High
Court—Standard of reasonable maintenance—Law Reform (Miscel-
laneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 5.*

Hodson, J.

The question what is "reasonable maintenance" for a wife and children under the provisions of s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, must be considered with reference to the husband's common law liability to maintain his wife and children, and the word "reasonable" interpreted against the background of the standard of life which he had previously maintained. Provided that the husband is paying and has been paying what is *prima facie* reasonable maintenance for them, that maintenance does not become unreasonable when tested against the amount which a wife might obtain if she had succeeded in proceedings for judicial separation or divorce.

The court cannot accept that the test of reasonableness is not satisfied because there is no security for the amount which the wife has been receiving from her husband, or because there is uncertainty whether or not her allowance will continue, even though security for the joint lives of the parties may be obtained by a wife who succeeds in a suit for restitution of conjugal rights or who obtains an order under the section after a finding of a wilful neglect to provide reasonable maintenance.

WIFE'S APPLICATION for an order for periodical payments under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (1).

(1) The Law Reform (Miscellaneous Provisions) Act, 1949, s. 5, sub-s. 1 (now s. 23 of the Matrimonial Causes

Act, 1950): "Where a husband has
"been guilty of wilful neglect to pro-
"vide reasonable maintenance for his

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The following statement of fact is taken from the judgment:—
On September 15, 1950, the wife left the husband and took with her the two daughters of the marriage, a girl of sixteen and a girl of twelve, leaving the husband behind with two sons, a boy of eighteen and a boy of fourteen. She stated that she was forced to leave her husband because of his cruelty. That was denied. The wife said that the husband had been guilty of wilful neglect to provide reasonable maintenance for her or for her children, notwithstanding the fact that she had been in receipt of 10*l.* a week free of income tax at all material times since the parting, the financial position so far as was material being approximately as follows: that the husband was a farmer who sold his farm and has some 40,000*l.* in cash, representing the proceeds of the sale of the farm and farm stock, while the wife had virtually nothing. The husband had the younger boy with him; the elder boy was described as a farm worker in the affidavit which he had sworn and was not shown to be otherwise engaged at the present time, although he was not working for his father as he was before. The husband said that his wife had deserted him. Besides the affidavits which were sworn in the proceedings, the only material before the court was contained in some correspondence which had passed between the parties. By agreement, the correspondence was referred to, notwithstanding the fact that part of it was written without prejudice, each side having waived its privilege.

It appeared from the wife's solicitors' letter of September 18, 1950, that during the marriage she claimed to have received 3*l.* 10*s.* 0*d.* a week for housekeeping, out of which she had to pay something for music and elocution lessons for her daughters, their pocket money, their dinners at school, and some other amounts, which did not seem a very large allowance having regard to the comparatively large sum which was realized on the sale of his farm. The question was whether it was possible for

"wife or the infant children of the
"marriage, the High Court in Eng-
"land, if it would have jurisdiction to
"entertain proceedings by the wife
"for judicial separation, may, on the
"application of the wife, order the hus-
"band to make to her such periodical
"payments as may be just; and the
"order may be enforced in the same
"manner as an order for alimony in
"proceedings for judicial separation".

Sub-s. 2: "Where the court makes

"an order under this section for
"periodical payments it may, if it
"thinks fit, order that the husband
"shall, to the satisfaction of the court,
"secure to the wife the periodical pay-
"ments, and for that purpose may
"direct that a proper deed or instru-
"ment to be executed by all necessary
"parties shall be settled and approved
"by one of the conveyancing counsel
"of the court".

the wife to establish that the husband has been guilty of wilful neglect to provide reasonable maintenance for her or for her children. The husband's property being cash and there being no income coming in, the problem so far as income was concerned would properly be approached by treating the 40,000*l.* as invested at a rate of something between 3 per cent. and 4 per cent., thus producing a notional income of about 1,500*l.* gross, whereas in order to produce a sum of 520*l.* free of tax for the wife and the two children concerned, it would be necessary to set aside a capital sum producing a notional income of about 945*l.* a year.

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John Latey for the wife.

H. V. Brandon for the husband.

HODSON, J., referred to s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949 (1), and continued:—As a matter of history, s. 5 of the Act of 1949 was clearly introduced in order to simplify the procedure by which in the High Court a wife might in appropriate circumstances obtain what are called periodical payments. One has to look at s. 187 of the Supreme Court of Judicature (Consolidation) Act, 1925 (2), which, after providing that a decree for restitution of conjugal rights should not be enforced by an attachment, provides that in the event of failure to comply with the decree the court may order the respondent to make the petitioner such periodical payments as may be just. In the second sub-section, it is provided that the court may order the husband to secure to the wife the periodical payments. Section 5 in its two sub-sections follows the same line as s. 187 in its two sub-sections, the position now being that instead of the husband who is living apart from his wife and whose wife desires maintenance being given the alternative of taking her back or showing cause why he should not do so, and, failing either, being ordered to provide for her periodical payments, a short cut, so to speak, can be taken, and the wife is entitled to say that she demands periodical payments provided that she can prove that he has been guilty of wilful neglect to provide reasonable maintenance for her or for her children. The field is wider than it was before because a wife who is unwilling to return to her husband is not in a position to apply for a decree of restitution of conjugal rights

(2) Since replaced by s. 15 (as to decree) and s. 22 (as to payments) of the Matrimonial Causes Act, 1950.

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ordering him to take her back, whereas she may be able to say that he has been guilty of wilful neglect to provide reasonable maintenance because she has good ground for living apart from him. But, before she can take advantage of s. 5 of the Act of 1949, she has to show that the husband has been guilty of wilful neglect to provide reasonable maintenance for her or for her infant children.

[His Lordship then stated the facts and continued:] As I understand it, the question of what is reasonable maintenance for the wife and children has to be considered, with reference to the husband's common law liability to maintain his wife and children, and the word "reasonable" no doubt has to be interpreted against the background of the standard of life which he previously had maintained. But, even taking these matters at their highest against the husband, it does not seem to me that the wife can succeed in establishing on these figures that there has been the requisite failure unless she is entitled to say that the reasonableness may be tested in other ways. For example, Mr. Latey seeks to submit that, since there is no security for the amount which the wife has been receiving, although security at least for their joint lives could be obtained by the wife if she succeeded in a suit for restitution of conjugal rights, or if she succeeded in obtaining an order under this section, the test of reasonableness is not satisfied. He goes on to say that, as there is no certainty that the allowance will or will not continue, again the test of reasonableness is not satisfied. But I am unable to accept those contentions. It seems to me that, provided the existing state of affairs is that the husband is paying, and has been paying, what is *prima facie* reasonable maintenance for his wife and two children, as I find is the fact in this case, the maintenance does not become unreasonable when tested against the amount which a wife might obtain if she had succeeded in some proceedings which she might have taken, or which she indeed might yet take; because if the wife has left her husband because of his cruelty, of which she is complaining, she can take proceedings against him on the ground of that cruelty either for a judicial separation or for divorce. In those proceedings she is entitled to claim alimony *pendente lite* and, in the event of her succeeding in those proceedings, she is entitled to claim a permanent provision for herself whether by way of alimony or by way of maintenance. In the event of divorce, she is entitled to claim maintenance to be secured to her for her life as opposed

to the period of joint lives, which appears to be the utmost that can be obtained under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949.

I do not think that I need pursue any of the other matters raised on this application—for example, the question whether an interim order is appropriate, having regard to the fact that no reference is made to interim orders in the section itself, although it is made in rules of court. In my judgment, the wife's application fails on the ground that she has not shown that the husband has been guilty of the wilful neglect to provide reasonable maintenance which it is necessary for her to prove.

I might add that there is no specific evidence in this case directed to circumstances which make any particular sum necessary to support either the wife or either of these two girls that I have to consider. I am not told, for example, that the wife is living in any particular circumstances or that her rent is higher than it would be in circumstances applicable to a normal wife. The same applies to the two children. For instance, there is no evidence as to the elder child, who is sixteen, being at school, or as to any special expenses which are attributable to her maintenance. The evidence is exceedingly sparse, but certainly there is nothing in the evidence to inflate the figure which has already been given.

What I have said does not in any way bind the court as to what it would order in the event of this particular set of figures falling to be considered in other circumstances because, to put it another way, wilful neglect is not automatically established when it is held that the amount paid is less than the court might order in the case of a guilty husband and an innocent wife in proceedings brought, for example, on the ground of cruelty or adultery or desertion for three years. The result is that the wife fails to get what she has sought today—namely, an order directing that the issue which she wants to have raised, the issue of cruelty, should be decided in these proceedings. She has sought to say through Mr. Latey that in effect the husband has consented to that issue being raised by saying that he will pay at the rate at which he has been paying until the issue of his liability is determined. But, having considered the correspondence, I do not think that it really bears that interpretation. All he has said really is that he has made no admission as to liability for the maintenance of his wife and he has taken the stand in his affidavit that his wife has left him without cause and that he is not guilty

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1950 of cruelty towards her. In my judgment this summons must be
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Application dismissed.

Hodson, J.

Solicitors: *Rider, Heaton, Meredith & Mills, agents for
 Bellyse & Eric Smith, Nantwich; Robinson & Bradley, agents for
 A. E. Whittingham & Son, Nantwich.*

J. B. G.

Overruled. VINET v.
 VINET
 [1951] P. 457

Disapproved. VINET v. VINET.
 [1951] 2 All E.R. 204.

WHITNEY v. WHITNEY.

1950
 Dec. 11,
 12, 13.

Willmer, J.

*Husband and wife—Divorce—Desertion by wife—Marital intercourse
 during statutory period—Absence of true reconciliation.*

Once desertion has begun, the mere fact that the parties have cohabited in the course of a genuine effort by one spouse to effect a reconciliation is not itself necessarily enough to interrupt the desertion.

A wife by her conduct was held to have deserted her husband towards the end of 1945. Between then and August, 1947, the husband visited her on some half-dozen or more occasions at week-ends in attempts to effect a reconciliation. During those visits he stayed with the wife and marital intercourse took place. Within three years of the last of those visits the husband prayed for a decree of divorce on the ground of his wife's desertion.

Held, that the husband was not in the circumstances precluded by those visits from the relief to which he was otherwise entitled, notwithstanding the marital intercourse which had taken place; for there was no evidence of any bilateral intention to set up a matrimonial home, the wife having, on the contrary, since her initial act of desertion, maintained throughout her determination to live separate and apart from the husband.

Bartram v. Bartram [1950] P. 1 and *Mummery v. Mummery* [1942] P. 107 applied.

DEFENDED PETITION for divorce.

The parties were married in 1938. The husband was employed, both before and after the war, as a docker in Hull. The wife was a native of Leeds. She lived with the husband in Hull until the outbreak of war in 1939. During most of the war she lived with her parents in Leeds while her husband was on

[This case was tried at Leeds Assizes and has been reported with the courteous assistance of counsel engaged on the case.]

active service both at home and overseas. On his demobilization the husband was anxious to resume his civilian employment, and it was found on the facts that, in so far as the question arose, this was a proper case in which the husband's work should be regarded as a circumstance deciding where the matrimonial home should be.

The parties resumed cohabitation for a short period in Hull during the autumn of 1945. They were unable to obtain premises which were satisfactory as a matrimonial home, and towards the end of 1945, the wife returned to Leeds. The parties never had a home together afterwards.

During 1946 and 1947, however, the husband visited the wife in Leeds at approximately regular intervals on some half dozen week-ends, and the court, notwithstanding the wife's denial, believed the husband's evidence that during those week-end visits marital intercourse had taken place. The last occasion of such intercourse was in August, 1947.

The wife by her petition, which was dated March, 1950, alleged desertion from 1945. The husband by his answer, dated July, 1950, also alleged desertion from 1945. It was found that the separation in that year was brought about by an act of desertion on the part of the wife, and that there was nothing, except the possible effect of the week-end visits, on which the issue turned, to terminate that desertion before the answer was filed in July, 1950.

H. S. Pears for the wife. The husband's week-end visits, during which he and his wife slept together and had sexual intercourse, were a regular and consistent course of conduct which amounted to cohabitation. This course of conduct extended to a date in August, 1947, which was within a period of three years immediately preceding the presentation of the answer. Intermittent intercourse usually prevents systematic absences from becoming desertion. *Mummery v. Mummery* (1) is distinguishable. In that case the parties had not lived together for a number of years when sexual intercourse took place on a single occasion. The wife, who was seeking relief, was there allowing the husband to have sexual intercourse with her in the hope of a reconciliation; but in the present case it was the husband who was demanding sexual intercourse while cohabiting with the wife.

Bartram v. Bartram (2) is also clearly to be distinguished. There the respondent had never been more than an ordinary lodger in the petitioner's house, and no sexual intercourse had taken place within the three years immediately preceding the presentation of the petition. It is submitted that cohabitation

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(1) [1942] P. 107.

(2) [1950] P. 1.

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has extended in the present case to within three years of the presentation of the answer, and that the husband is therefore not entitled to a decree on the ground of the wife's desertion.

J. B. Willis for the husband. Desertion is the withdrawal not from a place but from a state of things, and a resumption of cohabitation means at least resuming a state of things. Assuming that desertion by the wife is established as from the end of 1945, the husband is entitled to say that that desertion, once established, continued until proved to have been brought to an end by a resumption of cohabitation. A resumption of cohabitation means the setting up of a matrimonial home, and that involves a bilateral intention in the parties to set up home together.

The wife by her refusal to return to Hull showed that she had no such intention. The husband's week-end visits were attempts at reconciliation, and the acts of intercourse were part of those attempts, which were never successful because of the attitude of the wife.

[He referred to *Mummery v. Mummery* (3), and to the judgments of Bucknill, L.J., and Denning, L.J., in *Bartram v. Bartram* (4).]

Pears in reply. It cannot be argued that, because only one act of sexual intercourse took place during the statutory period of three years immediately before the date of the answer, on the authority of *Mummery v. Mummery* (5) the desertion is not terminated. That act of intercourse in August, 1947, was the last act in a course of conduct which shows that cohabitation was resumed; and desertion by the wife, if any, did not begin until August, 1947.

WILLMER, J. [after considering the evidence and finding that the wife had deserted the husband without cause in 1945:] The husband's answer is dated July 17, 1950. Bearing in mind that on his own showing the parties stayed together, and that marital intercourse took place as recently as August, 1947, it is obvious that the question arises whether the husband is in a position to prove the three years' continuous desertion immediately preceding the presentation of the answer. I must consider, therefore, whether I can properly regard the desertion as having begun in December, 1945, and as having been continuous since then, or whether, on the other hand, I am bound to conclude that the desertion only started after the husband's last visit in August, 1947. On that point I have had the benefit of a very able argument from Mr. Willis, which, put in a nutshell, is

(3) [1942] P. 107.

(5) [1942] P. 107.

(4) [1950] P. 1.

that, once desertion has started, the mere fact that the parties cohabited in the course of a genuine effort by one of them at reconciliation is not necessarily enough to interrupt the running of the statutory period of desertion. On that proposition, I shall refer in the first place to the decision of Lord Merriman, P., in *Mummery v. Mummery* (6). In that case the wife was proceeding against her husband on the ground of desertion, but it appeared that, during the three-years' period on which she was relying, the parties had met on a single occasion and had had intercourse at the instance of the deserting husband. The President came to the conclusion that in the circumstances the period of desertion was not in law interrupted by the single act of intercourse which took place.

It would be helpful to read what I regard as the material part of his judgment, because, as I see it, he states the principle involved in terms which are wide enough to embrace the present case. He said (7): "The whole question turns on what a resumption of cohabitation means. Lord Merrivale said more than once that no judge has ever attempted to give a comprehensive definition of desertion, and that probably no judge would ever succeed in doing so, but among the descriptions of desertion which he gave was one which has always appealed to me. He said that desertion was a withdrawal not from a place, but from a state of things".

He cited *Pulford v. Pulford* (8) and continued: "Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so, but at least a resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bi-lateral intention on the part of both spouses so to do. Does intercourse on a single night in the circumstances of this case raise an irrebuttable presumption that the parties have resumed cohabitation even for that brief time? Put in another way, does it raise an irrebuttable presumption that the wife, in consenting to that intercourse, has condoned the previous desertion? I think it would lead to an absurd state of things if one were bound so to hold. Clearly, it can be nothing but praiseworthy on the part of a deserted wife to make every legitimate attempt to regain her husband's affection, company and support; and obviously the fact that during a period of desertion the parties met by arrangement to talk over their difficulties and the deserted wife did her best to persuade her husband to return to her while he remained obdurate, would not compel the court

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(6) [1942] P. 107.

(8) [1923] P. 18.

(7) Ibid. 109, 110.

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“ to hold, however protracted the meetings and even if they
 “ involved the parties spending the night or several nights under
 “ the same roof, that the state of desertion was brought to an
 “ end. Why then should a wife who goes a step further in the
 “ hope of effecting a reconciliation and allows her husband to
 “ sleep the night with her be held to have condoned the offence
 “ and to have resumed cohabitation when it is clear beyond
 “ doubt that the husband had no intention of resuming cohabita-
 “ tion? I do not think that I am obliged so to hold. In my
 “ view, the law is that, as regards the wife at any rate, an act
 “ of sexual intercourse is not conclusive on the question of
 “ condonation, and that it does not raise an irrebuttable
 “ presumption that cohabitation has been resumed ”.

In that case Lord Merriman, P., stated the proposition of law on which he was relying in terms wide enough, in my opinion, to cover the present case. It may be argued that what the President said was peculiar to the case before him, which is a conclusive authority only in a case where a single act of intercourse took place, and where the innocent party was the wife. Here we have not one occasion, but a number of occasions, to deal with, and it may be said that this is not, like *Mummery v. Mummery* (9), a case of an innocent party permitting intercourse on only one occasion at the instance of the other party.

The facts in this case are, undoubtedly, different from those in *Mummery v. Mummery* (9). If that case stood alone, wide as the President's words are, I might have experienced some difficulty in holding that they extended to cover the present case. But I have also received assistance from *Bartram v. Bartram* (10), a decision of the Court of Appeal.

The facts in *Bartram v. Bartram* (10) are very different from those of the present case, but are similar in this one material respect, in that it was a husband's petition. The question in that case was whether desertion on the part of the wife was terminated by the fact that she returned to live under the same roof as the husband. It was not suggested that intercourse took place, or that they had any common life; but it was said that she lived for some time preceding the presentation of the petition under the same roof as the husband, in circumstances in which they met each other and on some occasions had meals together. It was in relation to that state of affairs that the Court of Appeal expressed the opinion to which I am about to refer. Though the facts were different, there are passages in the judgment of Bucknill, L.J., which seem to me to state the principle on which the present husband's case must be weighed.

(9) [1942] P. 107.

(10) [1950] P. 1.

Bucknill, L.J., said (11): "I may refer to another passage in a judgment also delivered by the learned President in *Mummery v. Mummery* (12), where he said: 'Similarly, I doubt whether any judge could give a completely exhaustive definition of cohabitation, and certainly I am not going to attempt to do so, but at least a resumption of cohabitation must mean resuming a state of things, that is to say, setting up a matrimonial home together, and that involves a bi-lateral intention on the part of both spouses so to do' ". That is the quotation from *Mummery v. Mummery* (12) which I have already read. Bucknill, L.J., continued: "In *Hopes v. Hopes* (13) the husband failed to prove his case because he never succeeded in proving desertion. He never proved that there was any actual separation of husband and wife, although he did prove the intention on the part of the wife to desert. Therefore, the case failed at the threshold. But, in the present case, the husband has established actual desertion by the wife for many months. That being so, it seems to me that the husband is entitled to say that the desertion, once established, continues until it is proved that it has been brought to an end. The wife did not suggest at any time that she had brought it to an end. The question is, do the facts proved establish that it was brought to an end? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband—quoting the words of the President in the two cases (14) to which I have referred. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she came to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and which continued to run".

Asquith, L.J., said (15): "It seems to me wrong to hold that the three years' period was interrupted by any resumption of cohabitation, for such resumption involves, in the language of Lord Merriman, P., in *Mummery v. Mummery* (16), cited by my Lord, a bilateral intention on the part of both spouses to set up a matrimonial home together".

Denning, L.J., said (17): "The decision in *Hopes v. Hopes* (18) does not apply, because here the period of desertion had begun to run before the parties came to live together under the same

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(11) [1950] P. 5.

(12) [1942] P. 107, 109-10.

(13) [1949] P. 227.

(14) The other case referred to by Bucknill, L.J., was *Everitt v. Everitt* [1949] P. 374.

(15) [1950] P. 1, 6.

(16) [1942] P. 107.

(17) [1950] P. 1, 7.

(18) [1949] P. 227.

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“ roof. Once the period of desertion has begun to run, it does
“ not cease to run simply because the parties attempt a recon-
“ ciliation and for that purpose come together again for a time.
“ That was laid down by Lord Merriman, P., in *Mummery v.*
“ *Mummery* (19) and has never been doubted since. Indeed, I
“ would say in such a case the period of desertion does not cease
“ to run unless and until a true reconciliation has been effected.
“ Any other view would greatly hamper attempts at reconcilia-
“ tion, because it would mean that the deserted party would be
“ disinclined to take the other back for fear of losing his legal
“ rights in case the attempt at reconciliation was unsuccessful ”.

Bartram v. Bartram (20) carries with it an authoritative statement of principle by the Court of Appeal, and it is for me to apply that principle as best I can to the present case. I am satisfied on the facts that the period of desertion brought about by the wife began to run in December, 1945. There is no evidence that any “ true reconciliation ” has ever been effected between the parties since. I take that phrase from the judgment of Denning, L.J. It is equally true to say that here there is no evidence of any intention on the part of the wife since December, 1945, to “ set up a matrimonial home ” with the husband—the phrase used by Bucknill and Asquith, L.JJ. There is no evidence since 1945 in this case of any bi-lateral intention on the part of both spouses to set up a matrimonial home together. On the contrary, it appears to me that the wife has maintained throughout her determination to live separate and apart from the husband. It was the husband who made repeated efforts to bring about a reconciliation, going over for that purpose from Hull to Leeds.

In my judgment, such efforts at reconciliation can only be regarded as praiseworthy conduct on the part of the husband, and I should be sorry if, through such conduct, the husband were to lose any right to relief which he otherwise would have. But, having regard to the matters to which I have referred, I am satisfied that, on the true view of the law, notwithstanding the periodical visits by the husband for the purpose of effecting reconciliation, and notwithstanding the fact that intercourse took place during those visits, in law the desertion started by the wife in December, 1945, has never ceased to run, but continued running for a period exceeding three years preceding the presentation of the husband’s answer.

I would add this. It may very well be that each time an act of intercourse took place between these parties, the husband must be taken to have condoned the previous desertion of the wife; but each time the wife refused to go back to Hull and resume

cohabitation with the husband there, it seems to me that she was guilty of a fresh act of desertion which revived the previous desertion. In law the proper answer seems to me again to be that the initial desertion started by the wife in December, 1945, must be regarded as continuing. For these reasons it seems to me that the husband is entitled to a decree.

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Decree nisi.

Solicitors: *G. I. Chisholm, The Law Society Divorce Department, Leeds; Richard Witty & Co., Hull.*

J. B. G.

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Divorce—Maintenance—Computation—Serving army officer's income—Allowances in addition to pay—Wife's income.

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In this case the wife, having divorced her husband and obtained the custody of their three children, applied for maintenance. The husband was serving in Germany and having remarried, he received beside his pay of 967*l.* a year, 18*s.* 6*d.* a day for marriage allowance. The wife's only means were derived from taking in paying guests and she assessed the profit at 109*l.* a year. The Registrar did not take into account the marriage allowance but treated the wife's profit as 200*l.* The course adopted for fixing the wife's maintenance was to add 967*l.* and 200*l.* together, divide the result by three and then deduct the sum of 200*l.* This resulted in 189*l.* from which the family allowance for the two younger children under the Family Allowances Act, 1945, was deducted and the wife's maintenance fixed at 164*l.* a year. In addition a grant was made in respect of the three children of 1*l.* a week each. Collingwood, J., approved this result but gave leave to appeal.

On the wife's appeal the Court of Appeal increased the wife's maintenance to 275*l.* a year but left the children's grant untouched. The grounds on which this decision was based were (1.) there was no justification for treating the wife's profit as 200*l.* a year, and this afforded a ground for interfering with the judge's exercised discretion; (2.) the marriage allowance received by the husband was rightly not added to his pay: *Naish v. Naish* (1916) 32 T. L. R. 487 and *Bellenden v. Satterthwaite* [1948] 1 All E. R. 343 applied; (3.) the grant of the small allowance for the children was permissible as it was made to relieve the wife from income tax in respect thereof. But the fact that it was so low having regard to existing circumstances and to the eldest child being eleven years old was a matter to be taken into account in computing the wife's maintenance; (4.) there was no ground for deducting the family

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allowance made under the Act of 1945 from the figure otherwise arrived at as maintenance for the wife, but it was a matter that could be taken into account in computing the wife's allowance; and (5.) a correct amount of maintenance could not be arrived at by any rule of thumb calculation. It was not to be decided by the application of some strict arithmetical process: *Chichester v. Chichester* [1936] P. 129 and *Collins v. Collins* [1943] P. 106 referred to in support of this.

APPEAL from Collingwood, J.

On August 31, 1936, a husband and wife were married and there were three children of the marriage, born in 1939, 1942 and 1944. On August 4, 1950, the wife obtained a decree absolute for the divorce of the husband on the ground of his adultery, and the custody of the children. She had shortly before applied for the maintenance of herself and the children. The husband was serving as a major in Germany, and having remarried had, besides the pay of 967*l.* per annum and a ration allowance of 3*s.* 4*d.* a day, a marriage allowance of 18*s.* 6*d.* a day. The wife by an affidavit dated October 18, 1950, said that she had no means other than what she was being allowed by the husband and four guineas received from a paying guest which would end on November 20; and by another affidavit dated November 6, 1950, she said that she had obtained further paying guests and received an additional weekly amount of 4*l.* 14*s.* 6*d.* in respect of them. She assessed the whole of her profit as 2*l.* 2*s.* 0*d.* weekly.

On the application for maintenance coming before the registrar, he awarded maintenance to the wife as from November 30, 1950, of 164*l.* per annum, less tax, and maintenance for the children until they respectively attained the age of sixteen or until further order at the rate of 1*l.* a week for each child. Collingwood, J., sitting in chambers, dismissed the wife's appeal, but gave her leave to appeal to the Court of Appeal. The wife appealed.

King Anningson for the wife. The wife has continued to live in what was the matrimonial home with her three children. The court has been in the habit of making small orders for children of not more than 1*l.* a week each to avoid deduction of income tax, but that is a very small allowance in present circumstances and having regard to the ages of the children. Again, the wife's maintenance has been fixed at 164*l.* a year; but the husband's pay is 967*l.* besides the marriage allowance of about 336*l.* and

the ration allowance of about 60*l.* Both the registrar and the judge have ignored the allowances. Even if that was justified, the wife's maintenance would be unfair, but it is contended that the marriage allowance ought to have been included as part of the husband's income. Further, the wife's profit for taking in paying guests was wrongly treated as 200*l.* She herself said that the profit was 2*l.* 2*s.* 0*d.* a week, or 109*l.* a year, and yet it has been taken as 200*l.* The whole basis of the wife's maintenance as ordered was wrong. Further, the allowances for the children were too low and, if retained, that would be an additional ground for increasing the wife's maintenance. It is admitted, however, that the husband's ration allowance is not to be taken into account: *Collins v. Collins* (1). The proper mode of computation, taking into account the marriage allowance as part of the husband's income, is husband's income 1,303*l.* and wife's income 109*l.*, making together 1,412*l.* Divide this by three to arrive at 470*l.*, and after deducting the wife's income the sum of 361*l.* is reached. If, however, the husband's income was to be treated as 967*l.* and then the wife's maintenance would be 250*l.* a year, there was no justification for fixing the wife's maintenance at 164*l.*, for which purpose, besides treating the wife's profit as 200*l.*, the family allowance of 26*l.* in respect of the two younger children paid by the State under the Family Allowances Act, 1945, was, it is contended, wrongly deducted from the amount otherwise arrived at.

D. Tolstoy for the husband. It was pointed out in *Chichester v. Chichester* (2) that the court should provide for payment of what was reasonable as the wife's maintenance. There was, therefore, no general principle. This shows that there is no arithmetical rule.

[EVERSHED, M.R. I accept that, but the real difficulty arises from computing the wife's profit at the excessive amount of 200*l.*]

Collingwood, J., had accepted the argument that this sum was correct, and it is suggested that this court should do the same. The wife's own estimate could not be correct. The fair reading of her affidavits was that she was receiving in November 8*l.* 18*s.* 6*d.* There was no justification for treating the marriage allowance as part of the husband's income: *Bellenden v. Satterthwaite* (3) and *Naish v. Naish* (4). The marriage allowance must be set against the expense of maintaining the new wife in

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(1) [1943] P. 106.

(2) [1936] P. 129, 132.

(3) [1948] 1 All E. R. 343.

(4) (1916) 32 T. L. R. 487.

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Germany. Further, there is no ground for saying that the family allowance of 26*l.* should not be deducted and the justification for fixing the children's allowance at 1*l.* a week each is that it relieves the wife from having to pay income tax in respect thereof under the Finance Act, 1944, s. 25.

King Anningson replied.

EVERSHED, M.R. [after stating the facts]: It has been said many times and it must be emphasized that matters relating to maintenance are *prima facie* questions of discretion; and this court will not interfere with the exercise of the discretion save on principles which have been many times stated and are so well known that I need not refer to them in detail. Suffice it to say that it must be shown that the judge has upon some matter of principle gone wrong or has by his order done a manifest injustice. Mr. King Anningson has accepted the burden of showing this and he attacked the order and the basis on which it had been made both, generally, by saying that in the light of all the circumstances it was unjust, and, in detail, by seizing upon various elements which made up the computation and attempting to show that the computation was made on a wrong basis.

It will be convenient to say something at once about the 1*l.* a week allowance for each of the three children. It is stated, no doubt truly, that allowances of that amount are very frequently put in orders as to maintenance under the influence of certain legislation, and particularly s. 25 of the Finance Act, 1944. If a man is ordered to make an annual payment in respect of maintenance to his ex-wife, he does not pay the gross sum ordered, but that sum less the appropriate income tax. He accounts for that income tax to the Crown and the tax is treated as having been paid on behalf of the payee under the order. The section in the Act of 1944 was intended to make simpler cases where small maintenance orders are made and where in the case of children under the age of sixteen orders are made for payment of not more than 1*l.* a week. The following mechanical results, so far as income tax is concerned, then ensue: (1.) the full gross sum is paid over to the payee, the mother of the children, and (2.) the husband, the payer, is entitled to bring into account for his own income tax purposes the full gross sum so paid. But the benefit is not confined to this. Under the Finance Act, 1940, s. 24, the practical result is that while sums paid to the wife by way of maintenance are treated as her income for tax purposes, she is entitled in respect of the children to the full children's

allowances. That result follows from the language in s. 24, sub-s. 2 (b), which, so far as relevant, provides: "The relief to be granted to each of the individuals"—that is to say, two or more individuals who would be or might otherwise be claiming relief in respect of the same child—"shall be computed as if" the Finance Act, 1920, s. 21, sub-s. 1, had provided "that that amount should be apportioned between the individuals in question in such proportion as they agree or, in default of agreement, in proportion to the amount or value of the provision made by them respectively"—then come the vital words in brackets—" (otherwise than by way of payments deductible in computing their respective total incomes for the purposes of the Income Tax Acts) for the child's maintenance and education for the year of assessment". The result is that, since the husband pays the sum over in gross and deducts the whole of it in his own income tax computation, the wife gets the whole benefit of the children's allowances. That, I understand, is how it works out in cases of small maintenance orders under the two sections.

Mr. Tolstoy, for the husband, has made certain calculations which I will assume to be correct and which show that, where the maintenance allowed for a child is not substantially in excess of £1. a week, the mother benefits as the payee of the sums for the child's maintenance. But the limitation of £1. a week for each child is a matter to be borne in mind in considering what ought to be paid to the wife herself as maintenance, particularly if the actual cost of maintaining the children is shown to be much in excess of the £1. a week allowed for each child. Having regard to the tax arrangements to which I have alluded, I am satisfied here that there is no ground for disturbing the discretion exercised in limiting the children's maintenance to £1. a week each.

It is not, however, to be supposed that as a result of these Acts the allowances to children in such orders must be rigidly fixed at £1. a week per child. That is not so, but in this case I find no ground for disturbing the course pursued which is very often and rightly pursued in cases of this kind.

There remains for our determination the question whether the sum of £641. allowed to the wife is right and in all the circumstances just. Mr. King Anningson has used some strong language and suggested that if we were to allow it to pass we should be doing something amounting almost to an offence against morality. I am not much moved by appeals of this kind, but I have come to the conclusion in this case that there is an error in

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the basis on which this sum has been arrived at, and that it has resulted in something which, in the circumstances, is not just.

By way of introduction to a consideration of this matter I refer to what Lord Merriman, P., said in *Collins v. Collins* (5), which I respectfully adopt. The question there was whether certain allowances for a serving Air Force officer should be added to his income for the purpose of arriving at the proper sum that he should pay to his former wife. The allowances amounted to 22l. a month and they were not subject to income tax. They were allowances for certain extra expenses which the officer, when serving, had to incur in the way of lodging and fuel. The President said that it would be flying in the face of the only reported decision of this court in *Naish v. Naish* (6) to do other than say that they were not to be "grossed up" and added to the income. But he went on to say that he did not take *Naish v. Naish* (6) as deciding that these allowances were to be wholly disregarded as though they had not existed. That led the President to say (7): "I ventured in *Chichester v. Chichester* (8) "to say that there were certain sums which, although they could "not be dealt with as a matter of strict calculation on one side "or the other of the account, had to be taken into account to "arrive at a just solution, for a just solution, as I have often "said, cannot be arrived at merely by taking a rule of thumb "calculation as between the respective incomes of the husband "and the wife, adding them together, dividing by three, and so "on". Then the President said that his statement in *Chichester v. Chichester* (8) had not been noted in a recent edition of a well-known textbook, and he again emphasized that these matters are matters not to be decided by the application of some strict arithmetical process or rigid rule of thumb application of fractions. These fractions are useful as guides or pointers to what is considered, in the ordinary case, to be the amount of maintenance that would be fair, but the court in the exercise of its discretion must arrive at what is in its opinion a fair result, on the facts of the particular case.

I bear all that in mind in approaching the computations which have been the subject of the present case. To some extent they involve matters of general importance, and it would not be right that I should pass them over entirely and confine myself to specifying a particular figure as fair. The first matter that

(5) [1943] P. 106.

(6) 32 T. L. R. 487.

(7) [1943] P. 108.

(8) [1936] P. 129.

obviously calls for inquiry—and it is here that there has, I think, been an error—is the amount of the wife's income from profit on boarders. The figure was taken at 200*l*. I think that there is something to be said for the view that this item might well be disregarded as things are at present. The wife was left with a family of three young children to bring up and a house to maintain. We know very little about the circumstances in which the house came to be taken. It may be that she simply has to do what she can to keep it going as a home for the children. However, that argument need not be pursued. I will assume that, since she is making some profit, according to the evidence, by taking in paying guests, this should be taken into account as a resource available to her and, therefore, to be taken into account in seeing what the husband should fairly pay in augmentation of that resource. But I cannot accept the figure of 200*l*. in support of which Mr. Tolstoy has strenuously argued. It is unfortunate that so little information was given to the court about the wife's paying guests. To have the parties up for cross-examination would be an expensive and perhaps undesirable course, but surely it was possible for the solicitors in the case to obtain the information. As it is, the court does not know what outgoings have been taken into account. What we do know is that the wife has sworn that she assesses her profit from the taking in of paying guests at two guineas a week, or 109*l*. a year. It is submitted by Mr. Tolstoy that there is matter in the wife's affidavits which is somewhat contradictory and that therefore the court is entitled to reject that estimate and make its own. I cannot agree. I think the evidence must be accepted as establishing that 109*l*. is the amount of profit, although later events may make a review of this necessary. The result is that the calculation made by the registrar is invalidated from the start because a wrong figure has been added to the husband's income of 967*l*., and that same wrong figure deducted after the division by three has been made. If, instead of 200*l*., the wife's income is 109*l*., and if the deduction of the family allowance of 26*l*. was omitted, the sum of 250*l*. for the wife's maintenance would be the right sum.

It is convenient next to dispose of the family allowance of 26*l*. As a matter of principle, I do not think that it is right to treat that as something which ought to be deducted from the sum arrived at by the previous calculations as being the proper amount that the husband should pay to the wife. It would be comprehensible to treat that 26*l*. as part of the wife's income and to bring it in earlier in the computation and deduct it with the

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financial burden and the allowance more or less cancel each other out. Certainly I am not prepared to say that the court below made any mistake in not bringing into account the marriage allowance of 336*l.* as an addition to the husband's pay of 967*l.*

Certain other allowances were referred to. Mr. Tolstoy urged that since as an officer the husband was allowed certain tax deductions—for example, 30*l.* uniform allowance—he should be entitled to say that for the purpose of calculating his obligation his income ought to be similarly reduced. He is a serving soldier and, as such, he is bound to keep up a position. That fact is recognized by the provision made for allowances and tax relief. Therefore (says Mr. Tolstoy) the husband has really got less than his pay, and if you disregard that fact you will, to use a phrase employed in the course of the argument, “kill the goose that lays the golden egg” by forcing him to resign his commission.

Following the directions of the learned President, I think that if these matters are to be taken into account, it is also to be taken into account that the petitioner is the ex-wife of a serving field officer and that she bore him three children which she has the obligation of bringing up. I feel a great deal of sympathy with a mother in that position with three young children to bring up. Bearing, therefore, all those things in mind, I have come to the conclusion that to limit the husband's obligation to the sum of 250*l.* which is arrived at by the simple process of adding 967*l.* to 109*l.*, dividing this total by three, and then subtracting the 109*l.*, does not do justice to the case. To bring the assumed profit from taking paying guests into account in that way works a little hardly against the petitioner. And I think that the sum allowed for the maintenance of the children is very much on the low side, having regard to present conditions and to the fact that the eldest child is eleven.

I hold, therefore, that the figure of 250*l.* should be slightly increased, so that justice may be done, by making it 275*l.* per annum, payable either weekly or as may be most appropriate. Thinking as I do that there was sufficient error in the original computation to justify this court in exercising its own discretion in the matter, I would substitute for the yearly sum of 164*l.* granted for the wife's maintenance the sum of 275*l.* per annum, but I would leave the grant of 1*l.* a week per child maintenance alone. To that extent I think the order should be varied.

JENKINS, L.J. I agree. This matter is one primarily for the discretion of the judge and this court will not interfere in such a

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case merely because it might, if exercising the discretion itself, have been disposed to take a different view. This court must be satisfied that in some respect or another the discretion has been wrongly exercised—in other words, that the court below is clearly wrong.

In my view, there are two respects in which this order is in error. First, there was no evidence, so far as I can see, to justify the conclusion that the wife's business of taking in paying guests was realizing any greater profit than two guineas a week. Therefore, the figure assigned to the wife's income in arriving at the joint income on which the calculation before us is based should, at all events, be reduced to, say, 100*l.* instead of remaining at 200*l.*

Next, I see no justification at all for treating the family allowances payable by the State in respect of the second and third child under the Family Allowances Act, 1925, as a deduction from the sum payable to the wife on the basis of an application of the so-called "one-third" rule as a method of calculation. In my view, the only way of dealing with these family allowances would be either to treat the 26*l.* a year involved as part of the wife's income for the purposes of the calculation, or else to leave it out of account altogether and to treat it merely as a matter to be borne in mind in considering what provision should be made for the children. The effect of reducing the wife's assumed income to 100*l.* and omitting the deduction of 25*l.* (it should strictly have been 26*l.*) in respect of family allowances from the figure arrived at as payable to her, is to produce in round figures a sum of 250*l.* payable yearly to the wife instead of the sum of 164*l.* ordered.

That leaves out of account the circumstances that the payment to be made for the maintenance of the children is only 1*l.* a week per child. In existing conditions, I should say that that figure was hardly adequate, and certainly, as my Lord has said, very much on the low side. It seems reasonably plain that the fixing of that figure was influenced by a matter of income tax convenience, if I may so describe it, to which my Lord has referred. For that reason I am far from saying that to fix the figure at 1*l.* a week was not the right course to adopt; but, at the same time, in fixing the payment to be made by way of maintenance to the wife, the circumstances ought, I think, to be taken into account that the provision made for the children is only 1*l.* a week each, with the addition of the family allowance of 26*l.* for the two youngest children. That being so, I think it

is a case in which some addition should be made to the figure so far arrived at. I agree with my Lord that it would be appropriate to add 25*l.*, thus arriving at a figure of 275*l.* payable yearly for the wife's maintenance instead of 164*l.* as at present ordered.

On the matter of the marriage allowance and the ration allowance payable to the husband, I do not desire to add anything to what was said by my Lord. I agree that, in the circumstances of this case, it cannot really be said that the marriage allowance which became payable to the husband in consequence of his second marriage, after allowing for the additional expenses due to the marriage, especially under service conditions in Germany, resulted in his being capable of making any larger payment to his first wife after he has met the necessary expenses of the establishment of himself and his second wife than he could have been reasonably expected to make out of his pay as an unmarried officer if he had not remarried. Accordingly, I agree with the order proposed by my Lord.

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Jenkins, L.J.

HODSON, L.J. I agree, and have nothing to add.

Appel allowed.

Solicitors: *Radcliffes & Co.; Curwen, Carter & Evans.*

H. C. G.

PICKETT v. PICKETT (*orse.* MOSS).

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Feb. 21.

Husband and wife—Practice—Pleading—Form of pleading—Answer to petition for nullity—Denial of impotence and wilful refusal—Cross charge of desertion.

Barnard, J.

It has been the established practice of the court for a respondent to a nullity suit to put forward a charge of a matrimonial offence by way of a separate petition; but in order to save expense, an answer and a cross petition may be contained in one and the same document.

Anonymous (1857) Dea. & Sw. 295, *Humphrey v. Williams* (*falsely calling herself Humphrey*) (1860) 29 L. J. (P. & M.) 62 considered.

Procedure and form of pleading explained.

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SUMMONS (adjourned into court).

On June 27, 1950, the husband petitioner filed a petition in the Reading district registry alleging that his marriage had not been consummated by reason of the wife's impotence or, in the alternative, her wilful refusal to consummate the marriage. He prayed the court to declare the marriage null and void. On September 28, 1950, the respondent filed an answer to the petition in which she denied the allegations; and in paras. 5 and 6 of her answer she alleged that the petitioner had deserted her for a period of not less than three years immediately preceding the presentation of the answer and she prayed the court to reject the prayer of the petition and to dissolve the marriage.

On December 19, 1950, on the application of the petitioner, the district registrar struck out paras. 5 and 6 of the answer, and the respondent wife appealed.

A. C. Bulger for the wife (the appellant).

R. V. Cusack for the husband (the respondent to the appeal).

Cur. adv. vult.

February 21. BARNARD, J., having stated the facts, said: The question of practice which I now have to decide is whether or not it is possible in answer to a petition for nullity to cross charge a matrimonial offence and seek relief in respect of it. Counsel referred to s. 180 of the Supreme Court of Judicature (Consolidation) Act, 1925, which reads as follows: "If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion, or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief".

This section only deals with divorce proceedings, and is therefore inapplicable to the present proceedings. I must, therefore, apply s. 32 of the same Act, which is in the following terms: "The jurisdiction vested in the High Court and the Court of Appeal respectively shall, so far as regards procedure and practice, be exercised in the manner provided by this Act or by rules of court, and where no special provision is contained in this Act or in rules of court with reference thereto, any such jurisdiction shall be exercised as nearly as may be in the same manner as that in which it might have been exercised by the court to which it formerly appertained".

The practice in the Ecclesiastical Courts was undoubtedly not to allow a respondent to plead a matrimonial offence in answer to a suit for nullity. In a case referred to as *Anonymous* (1), which came before the Consistory Court of London on May 16, 1857, Dr. Lushington admitted a libel of the husband in a suit brought by him for the purpose of having his marriage declared null and void by reason of the defendant's incurable malformation, but rejected that part of the defendant's responsive allegation which alleged that the plaintiff had been guilty of cruelty towards her and had committed adultery which entitled her to a decree of separation. It must be borne in mind that the taking of evidence and cross-examination of the witnesses were entirely upon deposition, and it was not until after publication of the evidence on both sides that the cause was set down for hearing. Dr. Lushington, in his judgment, after reviewing the authorities, summarized them as follows: "The results of these cases were twofold: first, "if the marriage be denied, that question must be disposed of "before evidence can be taken as to adultery or cruelty; second, "that without fresh citation the court may, in any matrimonial "suit where the validity of the marriage has been disposed of, "receive an allegation pleading adultery or cruelty, and separate "the parties if it be proved. Therefore, I am of opinion, both "upon principle and authority, that I ought not now, at this "stage of the cause, to admit the article pleading adultery to "proof; but I am equally clear, for the same reason, that the "court might possibly come to a decision in this case which "would justify the court in receiving this, or an allegation to the "same effect".

After the passing of the Matrimonial Causes Act, 1857, which compelled the attendance of witnesses before the court to be sworn and orally examined, this question was again raised before Sir Cresswell Cresswell in *Humphrey v. Williams* (*falsely calling herself Humphrey*) (2). This was a suit of nullity of marriage brought by the husband against his wife by reason of impotence. The respondent in her answer asserted the validity of the marriage, and alleged cruelty against the petitioner, concluding with a prayer for judicial separation. The judge ordinary, in granting the motion to strike out the answer, said that the answer tendered was in reality no answer to the petition, that it had no connexion with the substance of the petition either as a plea in bar or by way of mitigation, and that it must therefore be struck out.

It has been the established practice of this court, ever since, for a respondent to a nullity suit to put forward such a charge by way of a separate petition.

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(1) (1857) Dea. & Sw. 295.

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(2) (1860) 29 L. J. (P. & M.) 62.

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In the case before me the charge of desertion is no answer to the husband's plea of nullity, and the district registrar was therefore right in ordering that charge to be struck out in so far as it is only an answer. But, after careful consideration, and in order to save expense, I see no reason why an answer and a cross petition should not be contained in one and the same document, and I am therefore prepared to restore paras. 5 and 6, subject to the following amendment: between paras. 4 and 5 of the answer insert: "and by way of cross petition", and also insert a new paragraph, para. 4 (a): "4 (a) She repeats paragraph 1 of "her answer", and thereafter follow the restored paragraphs alleging desertion and the cross prayer for relief. The nullity suit will of course have to be tried first, and in some cases where, for example, there was a cross charge of adultery, it might not only be proper to try the nullity issue first, but, in order to save the expense of bringing witnesses to court, to deal with such a charge, also to try it as a separate issue.

With regard to costs, I think the proper order to make is that the wife's costs before the registrar and before me should be costs in the cause; and, as this was a summons, I think I should also grant a certificate for counsel.

Judgment accordingly.

Solicitors: *Stafford Clark & Co. for Soanes & Welch, Witney, Oxfordshire; Andrew Walsh, Lightfoot & Co., Oxford.*

J. B. G.

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Shipping—Contract—Construction—Damage to lighter while loading at jetty—Jetty-owners' liability.

By a contract in writing the defendants agreed with the plaintiffs to collect a quantity of anthracite, convey it to the defendants' own jetty and deliver it on board lighters which the plaintiffs agreed to have in readiness to receive it. The contract contained a condition by which the defendants disclaimed liability for any damage or loss whatsoever for which they would otherwise have been liable in relation to any goods handled by them, but which contained no reference to the safety of the jetty or to damage to lighters using it. In pursuance of the contract, on March 19, 1949, the plaintiffs' lighter Cawood III had loaded a part cargo of some 250 tons of

anthracite and was then left by the lighterman in charge securely and properly moored alongside the jetty for the week-end. The defendants' employees on the jetty also left. On the return to work on the following Monday the lighter was found to have sunk during the men's absence for no apparent cause, but when it was raised and surveyed it was revealed that the sinking was caused by the entry of water through a hole or puncture, measuring about two inches and a half by one inch, in the starboard side of the shell plating, at a point rather less than three feet below water level. On a claim for damages by the owners of the lighter against the jetty-owners, the court found, as a fact, that the damage to the lighter and her consequent sinking were caused by contact with a projecting bolt on the upper surface of a long timber boom fender which by the tide or wash had been turned outwards towards the lighter's side and had penetrated it under pressure. The plaintiffs contended that the contract must be regarded as subject to an implied term that the jetty should be in a safe and proper condition for their barges, or, at least, that the defendants would exercise reasonable care to make and keep the jetty in such a safe and proper condition, and that the presence of a boom with projecting bolts liable to cause, and which, in fact, did cause, damage to the lighter, constituted a breach by the defendants of their contractual duty. The defendants contended that the contract must be regarded as subject to the incorporation of the terms of a large notice headed "Warning" placed at several points on the jetty, which purported to disclaim all liability for damage suffered by any vessel using the jetty however caused, and of the conditions of which the plaintiffs must have become aware during the course of their business with the defendants over a substantial period.

Held, (1.) that the incorporation in the written contract of the exceptions clause relating exclusively to loss, damage or detention in respect of goods went to negative the implication in the contract of any exception relieving the defendants of liability in respect of damage to the plaintiffs' lighter; (2.) that the plaintiffs' lighterman in charge of their lighter could not be regarded as their general agent for the purpose of affecting them with notice of the existence or terms of the warning notices exhibited on the jetty, and that, in the absence of evidence that the notices were brought to the attention of the plaintiffs, they could not be taken as affecting the terms of the contract; (3.) that in the circumstances the contract must be read as subject to an implied term that the defendants would at least exercise reasonable care to see that their jetty was safe, or to warn if they had not done so; (4.) that the defendants had failed to exercise such reasonable care, in that the presence of the projecting bolt on the boom constituted a risk of injury which, though improbable, was a reasonably foreseeable risk, against which the defendants should have guarded; and (5.) that the terms of the notices exhibited on the jetty did not convey such a warning as would relieve the defendants from liability. The defendants were accordingly liable for the damage.

Stone v. Bolton [1950] 1 K. B. 201 considered.

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In pursuance of a contract entered into between the plaintiffs, Cawood, Wharton & Co. LD., and the defendants, Samuel Williams & Sons LD., the plaintiffs provided, on March 14, 1949, the lighter Cawood III to load at the defendants' jetty in the River Thames a cargo of anthracite, which the defendants had agreed to collect from the rail, haul to the jetty and put on board.

On March 19, after the Cawood III had received on board some 250 tons, the lighterman in charge left her securely moored at the jetty, with sufficient scope to allow for the rise and fall in the tide, for the week-end, and the employees on the jetty also left. On Monday, March 21, when the lighterman returned to work, he found that the lighter had sunk. When she was raised and surveyed it was found that the sinking was due to the entry of water through a hole or puncture, measuring about two and a half inches by one inch, in the starboard side shell plating at a point rather less than three feet below water level, having regard to the draught of the lighter at the time when she was left on March 19.

The plaintiffs accordingly claimed damages against the defendants in respect of the sinking of the lighter and her cargo, and satisfied the court that the puncture in her side was caused by the head of a bolt which protruded from the top of a long timber fender moored close up to the jetty, and that the boom had been turned outwards by some action of tide or wash and brought into contact with the lighter's side, penetrating under the pressure and weight of the partly loaded craft. By their defence, the defendants relied on the terms of a printed clause attached to their letter which formed part of the contract. The clause provided that the defendants "should not in any circumstances be liable "for any loss, damage or detention whatsoever, howsoever, "whensoever, or wheresoever occasioned, in respect of any goods "entrusted to or handled by them, even when such loss, damage "or detention may have been occasioned by the negligence, "wrongful act or default of the defendants, their servants or "agents, or others for whose acts they would otherwise be "responsible".

The plaintiffs contended that (1.) the contract must be regarded as subject to an implied term that the jetty should be in a safe and proper condition for the plaintiffs' barges, or at least that the defendants would exercise reasonable care to make and keep the jetty in such a safe and proper condition; that

(2.) the presence of a boom with protruding bolts liable to cause, and which, in fact, did cause, damage to the lighter, constituted a breach by the defendants of their contractual duty.

The defendants also relied on the terms of a notice alleged to have been exhibited at various points on the jetty, which read :

“ Warning.

“ All ships, vessels, barges with or without the cargoes laden therein, are allowed to lie at or off these premises upon the express condition that they do so solely at their own risk and that the company will not be responsible for any damage or loss, loss of life, personal injury or accident howsoever the same may be occasioned and even if so occasioned by the negligence or breach of duty of their servants or agents or other persons for whose acts they might otherwise be responsible, and the owners of ships, vessels, and barges agree to indemnify the company against any of the foregoing claims including all costs and expenses by whomsoever made.”

The defendants contended that the notice afforded ground for saying that, having regard to the previous course of business with the plaintiffs, the contract must be regarded as subject to an implied incorporation of the terms of the notice.

John Megaw, for the defendants, the owners of the jetty. The duty of the defendants is to do no more than to provide a berth for craft loading at their jetty; that is, to take reasonable care to see that the berth was reasonably safe. The relationship between the jetty-owners and the owners of the lighters using the jetty was that of invitor and invitee. In *Weigall v. Westminster Hospital* (1) the plaintiff was injured while visiting a patient in a hospital and the duty owed to the visitor was that of invitor to invitee. The plaintiff succeeded in the claim for damages on the ground that the risk of injury should have been anticipated by the hospital authorities. In the present case the risk of injury could not reasonably have been foreseen. The defendants were not under a duty to take precaution against something which might not reasonably be expected to happen. It was an extreme improbability that the boom in question here would cause, in the only way it could cause, the puncture in the side of the *Cawood III*. The boom had never before in a long course of years been known to turn over in the water as it has

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(1) (1936) 52 T. L. R. 301.

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been found to have done here. The fact that that happened through a combination of exceptional circumstances is not sufficient to make the defendants liable. [*The Moorcock* (2) and *The Bearn* (3) referred to.]

In view of the terms of the large and legible notice placed at several points on the defendants' jetty, with which the plaintiffs, or their servants, must have become aware during a long course of business, the defendants owed no duty at all to the plaintiffs. In *Stone v. Bolton* (4) the defendants were held liable because the accident which gave rise to that action was one that could have been foreseen. It is submitted that in the present case what happened was entirely unforeseeable and had, in fact, never happened before. The duty owed by the defendants to the plaintiffs was no higher than that of invitor to invitee. It is not now disputed that the warning notices on the jetty were where the defendants say they were; or that they have been there a long time; and the court should have regard to the long course of business relations between the parties.

[WILLMER, J. I can find no reference to "course of business" in the defence, as pleaded; there has been little evidence about it.]

[Counsel referred to *The Humorist* (5).]

[WILLMER, J. That case is of little assistance. A contract cannot be varied by putting up a notice. The duty of a wharfinger is surely to find out the condition of the under-water berth, or to warn the lighter-owner that he has not done so?]

Scott-Cairns, K.C., and *Knox Cunningham* for the plaintiffs, the owners of the lighter. It is submitted that the defendants owed a higher duty than that of merely taking reasonable care—some degree of duty between an absolute assurance and the taking of reasonable care. [*Francis v. Cockrell* (6) referred to.]

In *The Moorcock* (7) it was laid down that it was a wharfinger's duty to warn vessels using his berth that he had not taken reasonable steps to see that it was safe for such craft. It is in no way inconsistent with that decision to say that the duty may be higher. Where there is a contract there is a duty to do something more than exercise reasonable care, namely, to keep premises safe for the plaintiffs' use; except that the defendants would not be liable for damage caused by something

(2) (1889) 14 P. D. 64.

(3) [1906] P. 48.

(4) [1950] 1 K. B. 201.

(5) [1944] P. 28.

(6) (1870) L. R. 5 Q. B. 501.

(7) 14 P. D. 64.

undiscoverable by anyone. There is no "foul-berth" or shipping case where the duties of a wharf-owner are clearly laid down.

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April 9. WILLMER, J., reading his judgment, stated the facts, found that the damage to the Cawood III and her consequent sinking were caused by contact with the projecting bolts on the boom at the defendants' jetty, and continued:—This, however, is by no means the end of the case; for I have heard considerable argument as to the extent of the defendants' duty, and as to whether they are under any liability even if the damage occurred in the manner contended for by the plaintiffs. It is necessary at this point to refer to the terms of the contract under which the Cawood III came to the defendants' jetty. By the quotation contained with the defendants' letter of March 10, 1949, which the plaintiffs accepted by their letter of March 12, the defendants contracted to collect by rail from Coryton about 1,000 tons of anthracite duff, haul the same from the main line to the jetty and tip it into barges at Dagenham Dock, at an inclusive rate of 10s. 3d. a ton. This rate was expressed to be subject to certain conditions, only two of which are material for the present dispute. These are (a) that the plaintiffs would arrange to have sufficient barges available at Dagenham when required for loading, and (b) that the terms of a printed clause attached to the quotation should apply.

By the terms of the printed clause it was provided, inter alia, that the defendants should not in any circumstances be liable for any loss, damage or detention whatsoever, howsoever, whensoever or wheresoever occasioned, in respect of any goods entrusted to or carried or handled by them, even when such loss, damage or detention may have been occasioned by the negligence, wrongful act or default of the defendants, their servants or agents, or others for whose acts they would otherwise be responsible. By para. 2 of the defence this clause was relied on by the defendants, but I have not heard any argument with regard to its effect. It concerns only damage to the goods carried, and does not touch the question of damage to the barge. I was informed by counsel for the defendants that, in the event of my finding this casualty to have been caused by their fault, he would desire to rely on this clause in the Reference Room in order to defeat the plaintiffs' claim in so far as this relates to loss of, or damage to, the cargo. It was conceded that the clause had no application in relation to

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damage to the barge, with which alone I was invited to concern myself in these proceedings.

The importance of the printed clause, for the purposes with which I am concerned, lies in the fact that it makes no provision at all for damage caused to the plaintiffs' barge or barges; nor is anything said about the safety of the jetty or the berth in which the plaintiffs' barges would be required to lie. In those circumstances the plaintiffs contended that their contract with the defendants must be regarded as subject to an implied term that the jetty should be in a safe and proper condition for the plaintiffs' barges to lie thereat, or at least that the defendants would exercise reasonable care to make and keep the jetty in such a safe and proper condition. It was contended that the presence of a boom fitted with protruding bolts, liable to cause, and in fact causing, damage to the plaintiffs' lighter, constituted a breach by the defendants of their contractual duty.

For the defendants, reliance was placed on the terms of a warning notice alleged to have been exhibited at various points on the jetty. [His Lordship read the notice.] A good deal of evidence was directed to the issue whether these warning notices were in a legible condition, and whether they were placed in such positions that they could fairly be expected to be seen and read by persons and vessels frequenting the jetty. In order to get that matter out of the way, I would say at once that I am quite satisfied that the notices were both legible and so placed as to be readily seen and read by anybody minded to do so.

The defendants do not suggest that the exhibition of these notices to the lighterman in charge of the Cawood III can be relied on to vary the terms of the contract previously made between the plaintiffs and the defendants, if that contract was subject to such an implied term as is contended for by the plaintiffs. What they do contend is that these notices go to negative the implication in the contract of any such term as the plaintiffs suggest—and for this reason. Notices in identical terms have been exhibited on a number of jetties belonging to the defendants, including this one, for a considerable number of years, during which the plaintiffs have been doing business with the defendants, and during which craft belonging to the plaintiffs have, from time to time, habitually lain alongside the defendants' various jetties. In the circumstances it is contended that the plaintiffs must be regarded as affected with notice that the defendants will only allow craft to lie alongside their jetties in accordance with the terms of the warning notices, and that

any contract entered into with the defendants must be read as subject to an implied term in accordance therewith. If so, it is said, the contract between the plaintiffs and the defendants in this case cannot be regarded as subject to any such implied term as is contended for by the plaintiffs.

In my judgment this argument on the part of the defendants fails for a number of reasons: (1.) In so far as the defendants rely on the previous course of business between themselves and the plaintiffs, as affording grounds for saying that this contract must be regarded as subject to an implied incorporation of the terms of the warning notice, the onus is on the defendants to prove what the previous course of business was. This they have not attempted to do. All that is proved is that other barges belonging to the plaintiffs have, from time to time, had occasion to lie alongside various of the defendants' jetties. But nothing has been proved with regard to the terms of the previous contracts, in pursuance of which barges of the plaintiffs have used this or others of the defendants' jetties. (2.) It is not proved that any person representing the plaintiffs, other than the various lightermen in charge of their respective barges, ever had the terms of these warning notices brought to his attention, or ever had a fair opportunity of seeing and reading them. I cannot regard the lighterman in charge of a barge as the general agent of his owners for the purpose of affecting them with notice of the existence or terms of these warning notices. (3.) If it was desired by the defendants to incorporate in their contract with the plaintiffs a clause in the terms of the warning notices, nothing would have been easier than to do so expressly. (4.) The fact that the defendants did make their quotation expressly subject to a printed exceptions clause, to which I have already referred, raises the inference that the exceptions contained in that clause were the only exceptions to which the contract was to be subject, and goes to negative the implication of any other exception in favour of the defendants such as that contained in the warning notices. For all these reasons I hold that the exhibition by the defendants of these warning notices cannot be taken as affecting the terms of the contract which they made with the plaintiffs.

Are the plaintiffs then well founded in their contention as to the term to be implied in the contract with regard to the safety of the jetty? The defendants say that, in the absence of any express term in the contract, their duty cannot, in any circumstances, be put higher than a duty to exercise reasonable care to see that the jetty is safe for the plaintiffs' barge to lie. This

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they claim to have done. The plaintiffs put the defendants' duty higher, and contend that the contract must be read as subject to an implied term that the jetty would be as safe for the plaintiffs' barge to lie as reasonable care on the part of anybody could make it, and that the defendants must be held liable for the consequences of any defects, save only such as could not have been discovered by the exercise of reasonable care and skill on the part of any person concerned with the construction or maintenance of the jetty.

The plaintiffs claim that the defendants' duty towards a vessel coming to their jetty in pursuance of a contract, as here, is higher than the duty owed to a vessel coming there as an ordinary invitee. For this proposition they rely on the decision in *Francis v. Cockrell* (8) (where a contract was implied between the person who erected a stand to view a race-meeting and a member of the public purchasing a ticket for the stand), and on the decision of McCardie, J., in *MacLenan v. Segar* (9) (where the contract was between an innkeeper and his guest). The plaintiffs were not able to cite any case where the duty has been put so high in relation to a vessel coming to a jetty or wharf in pursuance of a contract with the jetty- or wharf-owners. The defendants, on the other hand, contend that the duty owed by them to the Cawood III under this contract was no higher than the duty owed to any vessel coming to their jetty as an ordinary invitee, namely, a duty to exercise reasonable care to see that the jetty is safe, or, failing that, to warn vessels coming to the jetty that they have not done so. They rely on *The Moorcock* (10) and *The Bearn* (11), decisions which have been followed on countless occasions in this court. They point out that in *The Moorcock* (10), according to the report, it appeared that the plaintiffs' vessel in fact came to the defendants' jetty or wharf in pursuance of a pre-existing contract. They also referred to the case of *Weigall v. Westminster Hospital* (12), where there was a contract between a nursing home and the plaintiff, who was the mother of a patient; yet the plaintiff was treated as being an ordinary invitee.

If it were necessary for me to decide between these conflicting contentions as to the nature of the duty owed by the defendants to the plaintiffs, I should be disposed to accept the lower duty contended for by the defendants, and to say that the duty of the

(8) (1870) L. R. 5 Q. B. 501.

(9) [1917] 2 K. B. 325.

(10) 14 P. D. 64.

(11) [1906] P. 48.

(12) (1936) 52 T. L. R. 301.

defendants in the circumstances of this case was no more than a duty to exercise reasonable care to see that their jetty was safe, or to warn if they had not done so. I think there may well be a distinction to be drawn between cases where the contract is for accommodation pure and simple, as in *Francis v. Cockrell* (13) and *MacLenan v. Segar* (14), and cases where the use of premises is merely incidental to the performance of some other contract, as in the cases cited by the defendants, and in this case.

On the facts of the present case, however, it seems to me that the conflict between the parties as to the standard of duty owed is quite unreal, and turns on a distinction without a difference. There is no question in this case of the defendants employing independent contractors for the maintenance of their jetty, or of their having to accept responsibility for the exercise of reasonable care on the part of anyone but themselves and their own servants. They have their own staff of employees charged with the duty of maintaining their respective jetties and carrying out such repairs as may be necessary from time to time. Those responsible for the upkeep of this particular jetty have in fact been called as witnesses before me. In the circumstances it appears to me that the defendants must stand or fall according as I decide that their servants have or have not exercised reasonable care to make and keep this jetty safe for craft such as the *Cawood III* to lie alongside. For the purposes of this case the question is whether it was consistent with such reasonable care on their part to provide a boom which had projecting bolts at either end, without taking steps to see that these projecting bolts could not come into contact with craft lying alongside.

The decision of this question depends, in my judgment, on whether competent persons in charge of the upkeep and maintenance of the defendants' jetty ought reasonably to have foreseen the risk of injury to craft coming or lying alongside through contact with the projecting bolts on the boom. Although far removed from the facts of the present case, it seems to me that the principle on which the majority of the Court of Appeal acted in *Stone v. Bolton* (15) is very much in point. That was a case in which the occupiers of a cricket ground were sued in respect of personal injuries sustained by the plaintiff in consequence of a cricket ball being hit out of the ground. It appeared that this was the result of a quite abnormally big hit. Nevertheless the defendants were held liable by Singleton, L.J., who said (16) that

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(13) L. R. 5 Q. B. 501.

(14) [1917] 2 K. B. 325.

(15) [1950] 1 K. B. 201.

(16) Ibid. 208.

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they had failed in their "duty to take reasonable steps to reduce "a danger which could be foreseen". Similarly, Jenkins, L.J., said (17): "I see no justification for holding the defendants "entitled to subject people . . . to any reasonably foreseeable "risk of injury". Later he summed the case up by describing the offending hit as (18) "a realization of a reasonably foreseeable "risk, which, because it could reasonably be foreseen, the "defendants were under a duty to prevent".

In the present case we have a set of circumstances which are similar in this way, that the casualty which occurred was one of a most unusual nature. According to the defendants' evidence, nothing of the sort had been known to have occurred before. Indeed, it was pressed upon me that the casualty cannot in fact have occurred in the manner alleged by the plaintiffs. But, as I have already said, improbable as the plaintiffs' case was, this is a case in which the improbable did in fact happen. Was it then a risk which the defendants or their servants, as reasonable men, ought to have foreseen and guarded against. In other words, did the boom, with the bolts projecting from its upper surface, constitute what can fairly be described as "a reasonably "foreseeable risk of injury" to craft lying alongside.

This is a matter on which I have thought it right to ask the advice of the Elder Brother. I asked him whether a competent man in charge of the upkeep and maintenance of this jetty could reasonably be expected to foresee that this boom, moored in this way, and with these unprotected bolts projecting from its upper surface, would be a source of danger to craft coming or lying alongside. I have thought it right to reduce to writing the actual words in which he expressed his answer to me. They were as follows: "I cannot advise you that any fender which has a "protrusion on it—particularly of sharp metal—is a safe or "desirable fender, unless *by test* it can be proved that it is 100 "per cent. incapable of being turned over. A reasonable person "designing a fender such as this ought reasonably to foresee the "danger, either of the fender turning over 90 degrees, or of a "vessel, by reason of her ship shape, over-riding it. It would "have been a reasonable and ordinary precaution to countersink "the end of the bolt and the nut, so that they did not protrude".

That is the advice of a practical seaman of experience, who understands the functions of a fender, the risks attendant upon a vessel coming alongside and lying alongside a jetty such as

(17) [1950] 1 K. B. 201.

(18) Ibid. 211.

this, and the factors that ought to be taken into consideration in designing the structure and arranging the moorings of a fender. It is advice on a subject which I should expect to be within the knowledge and experience of the defendants' representatives responsible for the maintenance and upkeep of this jetty and for the design and layout of the fenders or booms used in connexion therewith. In my judgment, such persons ought to have foreseen a risk which the Elder Brother tells me a reasonable person designing a fender such as this would have foreseen. In view of this advice, on a matter which is so clearly within the competence of the Elder Brother, I cannot do other than conclude that the defendants, through their servants, were guilty of a breach of the duty which they owed to the plaintiffs when they contracted for the plaintiffs' vessel to come alongside their jetty. The effect of what they did, by providing a boom with these projecting bolts, instead of increasing the safety of craft lying alongside, was actually to lay a trap for such craft and to increase the dangers normally attendant upon lying alongside the jetty. Accordingly, on this point also my judgment must be in favour of the plaintiffs.

Even this, however, still does not conclude the case, for the defendants still have a last line of defence that I have not dealt with. They contend that, even on the assumption that they were in breach of their duty to exercise reasonable care to see that their jetty was safe, they are nevertheless protected from liability for this damage by the exhibition of these warning notices to which I have already referred. I have already decided that the exhibition of these notices cannot be taken as affecting the terms of the defendants' contract with the plaintiffs. The defendants, nevertheless, rely on them in two other ways. Firstly, they say that on the principle stated in *The Moorcock* (19) the exhibition of a warning notice is sufficient compliance with any duty that they owed to the plaintiffs. Secondly, or alternatively, they contend that on any view the plaintiffs' lighterman, by going on in face of this warning notice and leaving his barge to lie unattended alongside the defendants' jetty, voluntarily accepted on behalf of the plaintiffs any risk of sustaining damage by so doing, so that, whatever default there may have been on the part of the defendants, the damage actually sustained was in fact solely due to the voluntary act of the plaintiffs themselves.

So far as the first of these contentions is concerned, I find

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some difficulty in reconciling it with the express terms of that condition in the contract between the parties by which the obligation was imposed on the plaintiffs to have sufficient barges available at Dagenham when required for loading. Had the plaintiffs' lighterman, on seeing the notices, declined to bring the Cawood III alongside the defendants' jetty, it seems to me that he would have exposed the plaintiffs to the risk of being sued for damages for breach of their obligation to have their barge available for loading. Having imposed on the plaintiffs, by the terms of the contract, an obligation to have their barge available when required for loading, I do not see how it is competent for the defendants, after the barge has arrived, to issue a warning that if the plaintiffs comply with their obligation it must be at their own risk. If that was the result that the defendants desired to achieve, it ought to have been expressly provided by the terms of the contract. In a case where the contract expressly imposes an obligation on the plaintiffs to have their barges available for loading, i.e., to send them alongside, it seems to me that it is too late for the defendants to comply with their duty under the contract by issuing a warning when a barge has already arrived.

But, further, with regard to both these points that the defendants raise, it seems to me that, in order to determine what, if any, effect the exhibition of these notices may have in law, it is necessary to look closely at the nature of the actual warning that is conveyed by them. On this point I have not been able to find any guidance in any of the decided cases to which I was referred. My attention has been called to *The Humorist* (20) and to *Richard Hughes & Co. v. Southern Railway Co.* (21), where, in both cases, wharf-owners had exhibited notices in terms similar to, but by no means identical with, the terms of the notices in this case. In the former case it was found on the facts that the notices were illegible, so that their effect was never properly brought to the attention of the plaintiffs' lighterman, and Pilcher, J., expressly refrained from expressing any opinion on the effect, if any, of the notice had it been legible. In the latter case it was held by Bateson, J., that the notice was of no effect, because it was inconsistent with representations previously made expressly by, or on behalf of, the defendants in correspondence. The notices in the present case must, therefore, be considered on their own merits, without any assistance from previous authority.

(20) [1944] P. 28.

(21) (1929) 34 Ll. L. R. 114.

What strikes me on reading the terms of the notice exhibited in the present case is that, in spite of their length and verbosity, and in spite of the fact that they are headed by the word "Warning", in large letters, they do not in fact convey any warning against any particular danger. What is a shipmaster or lighterman reading this notice to be on his guard against? There is certainly nothing to put him on his guard against the danger of putting his craft against the boom or leaving it unattended overnight in the loading berth. If the purpose of the notice is to comply with a wharf-owner's minimum duty to warn, as laid down in *The Moorcock* (22), what is required is a clear warning that the defendants have not made any examination to see that the berth is reasonably safe for craft to lie in. This notice does nothing of the kind. Bearing in mind that these notices were designed to be read and acted on, not by lawyers, but by ordinary men such as shipmasters and lightermen, I think that counsel for the plaintiffs was well founded when he suggested that, in order to be effective in either of the ways contended for by the defendants, the notices would have to be expressed in clear and concise language, so as to convey a clear warning of such danger, if any, as is known to exist, or at any rate a warning that the defendants have made no examination and taken no steps to see that the berth is safe. In my judgment the exhibition of the notices in the present case was entirely ineffective to relieve the defendants from liability for the breach of their duty, of which I have already found them guilty.

For these reasons my judgment in this case must be in favour of the plaintiffs on their claim for damages, which will be referred to the registrar for assessment in default of agreement.

Judgment for the plaintiffs.

Solicitors : *William A. Crump & Son ; J. A. & H. E. Farnfield.*

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Affirmed.
[1952] P. 34

An intention to bring the home to an end can be inferred from words. Although it may be more difficult for a spouse who alleges constructive desertion to rely on mere words, if it is proved that words of expulsion were intended to be final, conclusive and effective, such words provide the strongest evidence of the cause of separation and of the intention of the spouse alleged to be in desertion. The fact that it is necessary to use, and perhaps repeat, those words, is evidence of the lack of consent to the separation on the part of the complaining spouse. To hold that there is no desertion until a spouse is literally turned out, or until the door is literally bolted against his or her return, would be to ignore that words are conduct, and to place an arbitrary and unacceptable limitation upon proof of expulsion. To suggest that the separation itself is by consent unless some form of coercion other than words is used is to confuse the voluntary nature of the physical act of departure from a place with consent to the ending of a state of things.

The question whether in all the circumstances the words used are reasonably capable of bearing an expulsive meaning is one of law; but if they are so capable it is a question of fact whether they were meant to be expulsive.

In April, 1950, an order was made by justices in favour of a wife on the ground of constructive desertion. The wife then gave evidence that her husband, who had treated her with a marked lack of consideration, had frequently told her to leave. In October, 1950, on the initiative of the wife, the parties resumed cohabitation; but after a few days the wife again left her husband and took out a further summons on the ground of constructive desertion. The justices found that the conduct of the husband was such as to show the wife that her return was not welcome, and the wife gave evidence that she was often taunted with the phrase, "I never asked you to come back". On appeal by the husband:—

Held, that the words used were in the circumstances capable of meaning that the husband wished to be rid of the wife as soon as possible, and that the justices had evidence before them on which they could find that he meant to drive her from the home.

Per Willmer, J. (who expressed hesitation in reaching his decision on the facts). The question whether the facts relied on to prove an allegation of desertion constitute such a grave and weighty matter as to justify one of the spouses in withdrawing from cohabitation depends on the individual circumstances of a case. Complaints of lack of affection, even if accompanied by taunting remarks, can hardly, in view of the principles laid down in *Buchler v. Buchler* [1947] P. 25, be interpreted as conduct driving a spouse away if viewed in isolation; but such words, and

conduct may take on an entirely different significance when viewed against the background of the previous history.

Quære, whether desertion which has been condoned can be revived by conduct short of constructive desertion. *Per* Lord Merriman, P., *semble*, it can.

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APPEAL from Bradford justices.

The parties were married in 1946. In April, 1950, the wife left the matrimonial home in Doncaster and took out a summons which was heard by the justices at Bradford on April 28, 1950, when an order was made on the ground of (constructive) desertion. The husband did not appeal against that order, but later, on September 4, 1950, applied for a variation.

On September 28, 1950, on the initiative of the wife, the parties met and it was agreed that they should live together again. They resumed cohabitation on October 8, 1950, but the resumption of cohabitation was not a success, and the final parting took place on October 17, 1950, when the wife again left the matrimonial home. The present summons alleged desertion from that day.

At the hearing of the earlier summons the wife complained that after the first twelve months of the marriage the husband had sometimes not spoken to her for a whole day, had been lacking in affection, and had not given her a great deal of attention. He had, she had said, kept telling her to go, and she had in fact left on an earlier occasion in March, 1950. She had returned to him and he had said that he did not want her; his attitude was the same the following morning, and she had left the husband in April, 1950, as stated above.

The justices gave the following reasons for their decision of November 6, 1950:—

“ We were of opinion that the husband by his conduct to his wife caused her to leave him and that she was justified in so doing ”.

“ After living apart by virtue of [the earlier order] the wife approached him with a view to resuming cohabitation. The parties agreed to and did resume cohabitation; but after the first day trouble arose over money required by the wife for housekeeping. The husband gave her money which, in the aggregate, was not unreasonable having regard to their circumstances, but his attitude was then inconsiderate. In our view it showed lack of affection and was likely to show the wife that she was not welcome back. According to the wife, he often taunted her with the phrase, ‘ I never asked you to come back ’.

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“ That the husband’s request [by letter subsequent to the date of the summons] to his wife to return to him was not sincere and that we, the justices, having seen the parties, and noted, in particular, the demeanour of the defendant in the witness box, considered his promises could not be relied upon.

“ We accordingly found that the husband had deserted his wife . . .”.

The justices ordered the husband to pay 2*l.* a week by way of maintenance. They dismissed a complaint that he had been guilty of wilful neglect to provide reasonable maintenance.

The husband appealed.

The facts are stated more fully in the judgment of Lord Merriman, P.

J. E. S. Simon, K.C., for the husband.

R. J. A. Temple, K.C., for the wife.

LORD MERRIMAN, P., after dismissing that part of the appeal which concerned the amount of the order, continued:—I propose to begin by trying to state some elementary principles which apply to this case. They are not intended to be an exhaustive description, or definition of, or a treatise on, the law of desertion, for I share my predecessor’s view that no one ought to attempt to do that in any single judgment, and that if he did attempt it he would be unsuccessful.

Remembering always, as Lord Merrivale, P., said in *Pulford v. Pulford* (1), that desertion is not a withdrawal from a place but from a state of things, I will call that state of things, for short, “ the home ”. Desertion is proved if the husband leaves the home, or drives the wife away from the home, with intent to bring the home to an end and without her consent or fault. It does not matter, therefore, on which side of the front door, so to speak, the spouses are found when they part. When the fact of separation is proved, the intent to bring the home to an end can be inferred, amongst other things,—and, again, I am not trying to cover the whole or anything like the whole of the ground—from these three simple examples:—(a) the nature of the parting itself—for example, the husband bolts in a false name to the ends of the earth; (b) from conduct so brutal that, although nothing is said, the wife must leave home for fear of her life; (c) from words so plain that the husband may be taken to

(1) [1923] P. 18, 21.

mean what he says. Manifestly, there may be an infinity of variations even on these examples, and cases in which conduct is accompanied by some expressions of intention, or words of expulsion are linked with some kind of ill-treatment, are likely to be more common than not; but I have chosen those simple examples to bring out the point that there is no need, as was forcibly suggested, to prove the necessary elements in desertion by separate and distinct evidence directed to each several issue.

In the first example the fact of separation is itself evidence of intention to end the home. In the second and third examples, if the wife leaves the home because of what is done or said, as the case may be, the facts or words which cause the separation are also evidence from which the intention of the husband to bring the home to an end and the absence of fault or consent on the part of the wife may be inferred. It cannot be suggested that when the wife is driven from the home by brutal conduct the fact that she voluntarily turns the handle of the front door and hails a cab while the husband happens to be at work means that the separation is with her consent; but it is said that, if she leaves in exactly the same way because she is told to go, it cannot be desertion unless her wish to remain in the home is overborne by some form of coercion. The order to go can, so it is argued, only be evidence of the husband's intention to end the home, but the separation itself is by consent of the wife unless some form of coercion other than words is used. This seems to me to be a confusion of thought.

Apart from the fallacy that the same facts cannot lead to more than one inference, this argument confuses the voluntary nature of the physical act of departure from a place with consent to the ending of a state of things. It may well be that it may be more difficult for the wife to prove that mere words of expulsion were intended to be final, conclusive and effective. If the husband is ready and willing to continue cohabitation—(whether it is the original cohabitation or a resumed cohabitation does not matter, for this purpose)—and the wife unreasonably refuses to continue or to resume cohabitation, the husband cannot be a deserter and the wife may become one. That, of course, is elementary. But if the court does not believe that the husband is ready and willing to resume or to continue the cohabitation, and does believe that the wife would have been ready and willing to resume or continue the cohabitation, and in the case of resuming it would have been ready and willing to continue it, but for persistence in or renewal of conduct of which she has

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had reason to complain, then it may be held that the husband is the deserter and the wife is not.

I said that it may be more difficult for the wife to rely upon mere words; but if it is proved that the words were intended to be final, conclusive and effective, I ask what better evidence can there be both of the cause of separation and of the intention of the husband; and is not the very fact that he thinks it necessary to use, and, maybe, to repeat, those words evidence of the lack of consent to the separation on the part of the wife? Is it really to be held that she must wait until she is literally kicked out, or until the door is literally bolted against her return if she happened to be outside the front door? This, it seems to me, would be to ignore that words, after all, are conduct, and to place an arbitrary limitation on the evidence of expulsive conduct that I am not prepared to accept, and which I do not think is warranted by any authority of which I am aware.

Each case must be judged on its merits. The wife, of course, must prove that the husband means, and continues at all material times to mean, what he says; if not, she fails: she cannot simply take him at his word if he does not mean it. That is the point of cases like *Charter v. Charter* (2). I do not propose to refer in detail to that case. My understanding of it is shown in the judgment of this court in *Edwards v. Edwards* (3). *Edwards v. Edwards* (3), in its turn, has been twice approved by the Court of Appeal, namely, in *Squire v. Squire* (4) and *Everitt v. Everitt* (5). I do not ignore the fact that it was nevertheless criticized by Denning, L.J., in his judgment in *Hosegood v. Hosegood* (6).

Whether the husband does mean it, and goes on meaning it at all material times, or not, may be inferred from all the attendant circumstances, including antecedent conduct or words, and from any subsequent utterances, writings or events which throw light on his intention. In deciding the matter, I think that the question whether in all the circumstances the words used are reasonably capable of bearing what I will call an expulsive meaning, is one of law; but if they are so capable it is a question of fact whether the husband did so mean them; that is to say, it is now for us to decide the question of law, and, if that is decided in the wife's favour, to decide further whether there was evidence to support the magistrates' decision in fact.

With that preface I will now state the relevant facts of this

(2) (1901) 84 L. T. 272.

(3) [1948] P. 268, 269.

(4) [1949] P. 51.

(5) [1949] P. 374.

(6) (1950) 66 (Pt. 1) T. L. R. 735.

case. The marriage took place in December, 1946, the husband being a widower, the wife a widow. There are no children of the marriage. The husband had one child, a girl, by his first wife. In April, 1950, the wife left home, and returned to the house of a sister at Bradford. The physical home was at Doncaster at all material times. She asserted that she had not merely left the physical home, but that the husband had driven her from the home, in the sense in which I have used those words. She preferred that claim before the justices for the City of Bradford. They accepted her view of the matter, and made an order in her favour on the ground of desertion. Prima facie that is an important fact in this case, a part of the history. It was conceded that it would be right for us to look at any notes of evidence that there were, in order to see what sort of a case it was, and so that we might inform ourselves what was the real background and we adjourned for that purpose. We were provided with those notes, and then it was said that we ought not to pay any attention to them, because the justices had not read them. I am not able to accept that contention. It is quite plain that, if ascertainable, the facts of the previous desertion are of supreme importance in the case, and that, speaking generally, such notes might be vital to the determination of any similar issue which might arise.

In this case a similar issue arose within six months. On September 4, 1950, so far from having brought an appeal against that finding of desertion, the husband applied to vary the order. It so happens that the two magistrates who determined the case now under appeal were two out of the three members of the court who decided that issue. They heard the wife say at that hearing that she was ready and willing to resume cohabitation at any time; but I look in vain in the notes of that hearing for any suggestion that the husband was willing to do so. The application was made on the ground that his means had decreased, not on the ground that he had brought the desertion to an end. On September 28, 1950, on the wife's—not the husband's—initiative, there was a meeting at Wakefield, at which it was agreed that cohabitation should be resumed. On October 8, 1950, they resumed cohabitation. It was not a success, to put it quite neutrally, and on October 13, 1950, the wife returned to Bradford. It may be she went with the idea of reinstituting proceedings. It is only right to say in that connexion that her order still subsisted on the file of the court, and that on the occasion when it was reduced the husband had been ordered to make weekly payments off the arrears, so that there was, in fact, something

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which could be revived or brought into force again. The wife returned to her husband at Doncaster on Saturday, October 14, 1950, and she remained until Tuesday, October 17, 1950, when the final parting occurred. It is true that she left the matrimonial home after the husband, and not she, had cooked the breakfast; it is true that she left while he was at work; and it is true that she did not tell him that she was going, and that it was she who turned the handle of the front door of her own free will and summoned a van to take away her goods. Having left the home, she issued this summons charging her husband with desertion as from the day she left.

This is the moment at which it is necessary to examine what were the circumstances in which the earlier order was made, and what were the facts, including those circumstances, on which the present order was made. It is important to see what the wife complained of on the first occasion. They had been happy, she said, for the first twelve months. After that her husband sometimes did not speak to her for a whole day, and he was lacking in affection. He said that he could not help it. He had not given her a great deal of attention, and she had had to make her own company.

So far, on the authority of *Buchler v. Buchler* (7), which has been called to our attention in detail, there clearly was no grave and weighty matter which would justify her in leaving the home and saying that she had been driven from the home. But in the next sentence she said "He kept telling me to go since Christmas. "He told me where to go—Bradford. I left on March 24. He "did not speak to me hardly at all, that week. He told me he "did not want me". Then she spoke of a return to Doncaster. He said, "Are you still here? I don't want you", but she slept that night with him, and he said it again the next morning. She said that he helped her to remove, and that she then sent him a telegram and he came over to Bradford. She told him that she wanted to come back home, and he said he would not have come over at all, only that he thought she was sick. The following Saturday she went back to Doncaster. He said, "What have "you come for? I don't want you". She stayed the night, and she said that she "tried to be right with him". She left the next morning.

That was her evidence, but she was cross-examined to show that this was all untrue, that it was she who broke up the

home, that she had made up her mind to leave long before the date when she finally left, and that she had struck her husband and given him a black eye, and that she did not like the place where they lived. She said that she would settle anywhere if her partner had any feeling for her. She admitted that she had locked him out. To the charge of assault she retorted that he had blacked her eye. She denied that she had threatened him.

The husband developed the cross-examination in his own evidence. He said that the trouble was that she was run-down and made everybody else run-down, and that she was unkind to his child. He admitted that she had said, "I suppose you know 'I am leaving tomorrow?'" and he had said "All right" because he did not want to argue, as he was "fed up", and he explained the circumstances in which he had helped her to move. He admitted that when he received her telegram he said, "If I had 'known you were not ill I should not have come'; that she did come back; that he did not encourage her; and that he would have her back if it were not for his daughter; and then he said that he had seen his wife strike the daughter. Cross-examined, he denied that he had been telling his wife to go; he denied that he was relieved when he saw her go; he said he was sorry, in a sense, that she had gone; but he admitted that, when he went to Bradford, he said that he was sorry that he had come, as he thought she had been ill, and felt responsible; and in the last sentence of his cross-examination he said that his wife "did all 'she could to come back; I would not have her'". On that the justices found desertion proved.

The husband never appealed. On the contrary, he reaffirmed the order by seeking a variation. For my part I do not see what other conclusion, if they believed the wife, the justices could have come to, but it is not necessary to say more than that there was ample evidence to support their finding in favour of the wife. I need not consider the variation summons beyond referring, in passing, to the statement made by the wife, that she was ready and willing to resume cohabitation.

That brings me to the present case. On her return to Doncaster on October 8, 1950, she had, she said, only a shilling in her pocket, and her husband gave her 10s. the next day, out of which she had to pay his insurance, which left her with 6s. 3d. in hand for food till the next Thursday. She said that she had to borrow from her husband's daughter, who was at work, because he refused to give her any more money.

It is said on the one side that he did that in an inconsiderate

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way; that in the case of a man who had had more than a week, between September 28, and October 8, 1950, to prepare for his wife's return, it certainly did not show any marked enthusiasm, if it did not positively show a callous lack of consideration, that she should find nothing but the bare rations in the house when she came home on a Sunday evening, and no money with which to buy food until the following Thursday.

It is said on the other side that the wife's complaint about the money is completely beside the point, and, what is more, that it is unreasonable, because the justices have dismissed her summons for wilful neglect to maintain. That appears to me to be a false argument. I observe that in their reasons the justices say, as I think on this very point, that after the first day trouble arose over money required by the wife for housekeeping: "The "husband", they say, "gave his wife money which, in the "aggregate, was not unreasonable, but his attitude was then "inconsiderate", "then" being, in my opinion, an allusion to the trouble which arose the first day over money. They go on: "In our view it"—(that is, his inconsiderate conduct at that time)—"showed lack of affection, and was likely to show the "wife that she was not welcome back". I regard that as a direct allusion to the evidence to which I have just referred, and the two things are not inconsistent. It may be possible on the one hand to say that on the substantive charge of wilful neglect to provide reasonable maintenance, the maintenance paid during the all too brief period while they lived together up to the date of the summons did not show that in the aggregate it was an unreasonable amount, but that did not negative the suggestion that in not providing the reasonable amount at the right moment, and in the way in which he had refused to provide it at the right moment, the husband had acted with a lack of consideration, a lack of affection, which showed the state of mind in which he resumed cohabitation. There is no inconsistency between the two, and the justices have found, in my opinion upon evidence on which they were entitled to find, that fact in the wife's favour; and that cannot be disposed of merely by saying that they dismissed her summons for wilful neglect to provide reasonable maintenance. I shall come back to the justices' reasons in a moment.

When the wife told her husband the position of the house-keeping budget, he said, "You have managed, and that is all you "are going to have"; also, "I never asked you to come back. "He said it often". It is said that no significance is to be attached to that, and that quite clearly it is solely bound up with

her unreasonable attitude about money. The justices have not found that her attitude about the money was unreasonable at the time when the husband was being unreasonable about it, but I am not able to accept that the remark was only made about money. No doubt it was made about money, but I do not think, on the evidence, that it was only made about that. It was made often, and in that connexion the justices have found in the wife's favour that he often taunted her with the phrase "I never asked you to come back". "Taunted" is a word which imports that it was said in an offensive way, that it was said meaning what the words say, and that it was, so to speak, a hostile act. What is more important is that it was precisely the sort of thing which had broken up the home on the first occasion.

I agree with Mr. Temple's submission that there is, so to speak, no dictionary, the words in column one of the schedule of which amount to words of expulsion, while those in column two are not to be regarded as words of expulsion: it all depends on the circumstances of the case. The justices have found that she was justified in leaving him. In effect they have found, as I think, that she was treated with the same lack of consideration, or, to put it at the lowest, with signs of the same lack of consideration and affection as she had had cause to complain of before (though that by itself, no doubt, would not suffice); but that she had also been addressed in words which were not merely capable of showing that the husband wished to break up the home but actually did mean that.

I agree, of course, that if there had been no earlier history it may very well be that the events after this short resumption of cohabitation would not be enough. The same may be said, incidentally, of most cases of cruelty, and of a great many other cases of condonation. But in this case, as in the former case, the justices not only had the antecedent history, but they had the fact that they believed the wife, whom they saw, and did not believe the husband's lying disclaimer of the contentions put forward by the wife. At that hearing the husband tried to deceive the court into believing that it was he who wanted to continue the cohabitation; that the wife never meant, in his own words, "to give it a chance"; that she had come back, when she did come back, intending to leave at the earliest possible moment (though he never suggested why, having got an order which had not been challenged, she should wish to do everything she could to get rid of it, unless she meant to resume cohabitation); and, in a sentence, that it was he who was the one who really wanted all

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the time to resume cohabitation and that she had slunk out of the matrimonial home without any justification. The court did not believe him, and the fact that they thought that he was trying to deceive them in that respect is a very important factor in weighing and assessing the meaning of the words, oft repeated in a taunting sense, "I never asked you to come back". It is the true meaning of the words, the innuendo, that matters, and not the actual words used; those words are fully capable, in the circumstances, of meaning not merely "I did not ask you to 'come back'", but "I want to get rid of you at the earliest 'possible moment'". That is what the justices have held, and, for my part, I think they would have been abundantly justified in so holding, even if there had been nothing else.

But that is not the whole story: not merely did they find that he had tried to deceive them in this respect, but they found that he had tried to deceive them in respect of something which had happened afterwards. The moment the wife issued her summons the husband wrote her a letter, of which the plain meaning may be briefly summarized. After saying that she would be surprised to hear from him, but that "we might as well face facts", he said that there was no possibility of their ever agreeing with one another, and that from his point of view he was prepared to come to any terms she wished to make within reason; he suggested that he should pay her maintenance, which he promised faithfully to do this time "without misses" (meaning that he would not run into arrears as before) and that she should accept his promise instead of incurring the expense of going on with her summons, or even going to the court to enforce, if she could, the arrears which he had already been ordered to pay. What can that mean except this: "I have already been found guilty of desertion. You have 'got another summons for desertion. You can make it good if 'you like, because I do not dispute that this resumption of 'cohabitation is quite hopeless. But save me the money of 'going to court. Rely on my promise, with the sanction that 'you can go to court if I do not pay'. That is the man who had told the court that it was he who really was the willing party to this resumption of cohabitation, and that the wife was the defaulter. The solicitors took that up on the wife's instructions, and made what seems quite a reasonable suggestion for the amount of the maintenance. But they suggested that it would be better to put it in the form of an order.

After that letter had been sent the husband went to Bradford and asked his wife to come back. He complains that she treated

him with discourtesy, that she did not ask him into the house; but his wife did not think that he meant it. She promised to think it over, which showed that she was not being unreasonable; but, having thought it over, she wrote: "For the life of me I cannot understand you at all, for you do not show any love or affection at all, and it is more clear than ever that all you want me to do is to keep house for you and Rose, give me little or no money, and make provision for the payment of your debts. This is not right at all, and when all is said and done I can't forget what you said and how you treated me when I came back to you to try and make a go of it, and which only lasted a week. Yours, Sally". I think that is an extremely important fact, in construing the words to which I have already alluded, in assessing the intention of the husband and in determining what was the true nature of this parting, that in this respect, too, the justices found that he was trying to deceive them; that he never meant business when he went over to see his wife; and that it was the merest sham; and this case began with an admission by Mr. Simon that it was impossible for him to controvert that finding in view of the husband's own letter of October 21, 1950.

But there is more: in disbelieving the husband and finding that he was trying to throw dust in the eyes of the court in this respect, they correspondingly found that the wife was speaking the truth when she referred to her inability to forget what he had said and how he had treated her when she came back and tried to make a go of it.

That being so, the only remaining issue being whether the justices had evidence before them on which they could find that those words had an expulsive meaning, and that the husband did, in fact, mean to drive his wife from the home, there is an end of the matter, more particularly bearing in mind the very stringent reminders which have recently been pronounced in the Court of Appeal about the duty of appellate tribunals which have not the advantage of seeing and hearing the witnesses.

But I think, for myself, that this case can be disposed of on another ground. As it is not necessary to decide this matter, however, I will merely allude to it. I think that it can be decided equally upon the revival of the earlier offence of desertion, which, after all, was desertion, which continued within the six months, (though for the moment I am not concerned with that point), and by the subsequent misconduct. I do not propose to decide this issue, but I do wish to say that as at present advised I am not prepared to accept the suggestion that when desertion has been

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condoned there must be fresh conduct which per se is equivalent to the grave and weighty matter of a character described and considered in *Buchler v. Buchler* (8). Indeed, it is actually argued that, in relation to the offence of desertion, it is quite inapt to talk about condonation and revival, and that there is no authority for doing so. Well, there is one authority, at any rate, and that is *Mummery v. Mummery* (9), which happens to have been accorded the meed of approval by the Court of Appeal, as well as by this court.

I will only say this: it seems to me, without expressing any final conclusion on the matter, that, just as it must depend on the antecedent history what amends and assurances of good behaviour a wife may expect before being obliged to return and condone cruelty, and just as a threatened repetition of the conduct complained of may revive the original offence without obliging her to wait until the offence is completed anew before she is justified in leaving, so a wife is not obliged to await actual expulsion if the same sort of conduct, the same sort of words, which ultimately expelled her on the occasion when she has been found to be deserted, begin again. I doubt whether she is obliged to wait until there is something which can be called a completed offence of desertion to justify her in leaving home on the second occasion; but, as this point is academic in view of my opinion on the justices' findings, I do not think it necessary to say any more about it.

I think that this appeal should be dismissed.

WILLMER, J. I should like to begin what I have to say by expressing my entire agreement with, and, indeed, my admiration for, the masterly and very lucid exposition of the general principles applicable to this kind of case with which my Lord prefaced the judgment to which we have just listened.

Unlike my Lord, however, I confess that I have throughout regarded this as by no means an easy case, and the conclusion to which I have come, I admit, has not been reached without considerable doubt and hesitation.

We are concerned here only with an order of the justices, but I feel that one cannot be blind to the fact that such an order may always be the prelude to proceedings hereafter for dissolution of marriage. Bearing in mind what was said, particularly by

(8) [1947] P. 25.

(9) [1942] P. 107.

Lord Greene, M.R., in *Buchler v. Buchler* (10), it seems to me that we must be very careful to guard against the possibility of introducing what is, in effect, a new ground for divorce under the guise of constructive desertion. The statements of law by Lord Greene, M.R., and by Asquith, L.J., in that case have been read to us, and it is not necessary for me to read again the passages that have been referred to. I accept what was there said as our guide in deciding whether or not a case of constructive desertion has been established. The view of Lord Greene, M.R., can, I think, be summarized in a single sentence—actually part of a sentence—from his own judgment, where he says (11) that, in considering the question of constructive desertion, the acts alleged to be equivalent to an expulsion of the complaining spouse must be of such gravity and so clearly established that they can fairly be so described. All the members of the Court of Appeal in that case were at pains to point out that lack of consideration, lack of affection on the part of the one spouse or the other, however blameworthy it might be, was not a matter which could fairly be described as coming within that definition.

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It is precisely because in this case lack of affection is the matter which has been put very much in the forefront both of what the wife said in her evidence and of what the justices said in their reasons, that I have found great difficulty.

It must, I think, be stressed that what we are here concerned with is a summons alleging desertion on October 17, 1950. There had been a desertion six months earlier, in April, and in respect of that there was a pre-existing order of the justices whereby the husband was found to be the deserting party. It was at the wife's desire that the parties resumed cohabitation, which they did on October 8, 1950. Whether or not the husband actively desired to resume cohabitation does not matter for this purpose. The important thing is that the parties did agree to resume cohabitation, and it is not suggested, and certainly has not been found, that this was anything other than a bona fide agreement to resume cohabitation.

We start, therefore, with an agreement whereby the previous period of desertion on the part of the husband was brought to an end, and the subject of inquiry, as I see this case, is whether anything happened during the short period between October 8 and 17 of such a character as to make it possible to say that once again it was the husband who was constructively the

(10) [1947] P. 25.

(11) *Ibid.* 30.

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deserter, notwithstanding the fact that it was the wife who physically departed. I wish to make it clear that, in my judgment, it does not follow, merely because the husband was pronounced to be a deserter on the previous occasion, that therefore he must have been the deserter on the second occasion.

At the same time, for reasons to which I shall come back in a moment, one cannot get away from the fact that the circumstances of the previous desertion are highly relevant to the issue how the separation occurred on the second occasion. On that point the wife said; at the very end of her cross-examination, that "money and no affection" were the reasons why she did not come back. She went on to say, "He has done nothing to me", and I interpret that to mean that he was not guilty of any physical act in the way of expulsion. So far as the question of money was concerned, the justices came to the conclusion that the money which the husband gave to the wife during the short period of their resumed cohabitation was not unreasonable having regard to the circumstances of the parties; but with regard to the wife's other complaints they were of the view that he did show lack of affection and that he was inconsiderate. My interpretation of the notes of their reasons is that they meant that he was inconsiderate in relation to his conduct generally, and not only in relation to money matters, as was suggested to us; and by way of instancing what they mean by lack of affection the justices go on to refer to the wife's evidence, which they accept, to the effect that the husband during this period often taunted her with the phrase "I never asked you to come back".

It will be seen, therefore, that to outward appearance at any rate, the justices have based their finding of constructive desertion on what they themselves, to use their own words, have summed up as lack of affection. It has been argued (and this is the central question of this appeal, as I see it), that, having regard to what was said by the members of the Court of Appeal in *Buchler v. Buchler* (12), that could not in any circumstances justify a finding of constructive desertion; or, to put it another way, that lack of affection and lack of consideration could not in any circumstances be regarded as equivalent to conduct driving the other spouse away.

It is at this point that the question arises whether this court is entitled to interfere with the decision arrived at by the justices. Our attention was called during the argument to *Pew v. Pew* (13).

(12) [1947] P. 25.

(13) (Unreported); January 30, 1951 (C. A.).

We have been supplied with a transcript of what was then said, and the judgments of the members of the Court of Appeal have been read to us. That, like this, was a case of constructive desertion which the justices had held to be proved. That, like this, was a case in which the justices' decision was attacked in this court on the basis that it was inconsistent with what the Court of Appeal had said in *Buchler v. Buchler* (14). In that case this court allowed the appeal, and did so, as I understand it, on the basis that the facts, put at their highest in favour of the wife, did not bring the case within the principles laid down by the Court of Appeal. That case, however, went to the Court of Appeal, by whom the decision of this court was reversed, that of the justices being restored. There has been some discussion before us as to the exact ground on which the Court of Appeal relied in differing from the judgment of this court. I take it to be a decision, at any rate on the part of the majority of the Court of Appeal, that there was in that case evidence on which the justices could find that there had been constructive desertion; that is to say, as I understand their judgments, they took the view that the facts alleged by the wife, found by the justices and accepted by this court, were facts which were capable in law of amounting to desertion. If so, in the view of the Court of Appeal, the decision whether those facts did in the circumstances constitute desertion was a question of fact for the justices to determine, in the light of their acceptance or rejection of the evidence, and a matter in respect of which this court ought not to interfere.

So understood, it seems to me that the Court of Appeal's decision in *Pew v. Pew* (15) falls into line with what was said by Asquith, L.J., in *Buchler v. Buchler* (14): "It is, I think, possible to say of certain courses of conduct that they could not amount to constructive desertion, and of certain other courses that they could not fail to do so. This would appear to be a question of law, involving, as it does, the issue whether there was any evidence or no evidence to support the judge's conclusion. But between the extremes indicated there is obviously a no-man's-land where the issue is one of fact". In other words, going back to *Pew v. Pew* (15), the Court of Appeal in that case apparently took the view that the facts of that particular case came in the no-man's-land, where it was for the tribunal of fact to settle the issue between the parties.

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(14) [1947] P. 25, 46.

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It seems to me that in this case we are faced with a problem very similar to that which arose in *Pew v. Pew* (15). We have to consider, therefore, whether the facts proved by the wife in this case—and I say “proved by the wife” because I think it clear that we have to proceed on the basis that it was her evidence that was accepted and the husband’s evidence that was rejected—were capable in law of amounting to desertion. If they were so capable, then it seems to me that, following the guidance which we received from the decision in *Pew v. Pew* (15), it would not be for this court to interfere with the justices’ conclusion. At any rate, that is the problem to which I have endeavoured to apply my mind in this case.

I therefore come back to what I have previously said in relation to the history of separation in this unfortunate marriage. It has been conceded, I think, on behalf of the husband, that the facts alleged by the wife as amounting to desertion in respect of the separation of October 17, 1950, must be judged against the background of the previous history, that is to say, against the background that for a period of months the husband had previously been the deserting party. It appears to me that in any case the question whether the facts relied on constitute such a grave and weighty matter as would justify one of the spouses in withdrawing from cohabitation depends on the individual circumstances of the case, judged against the background of the previous history. So, in this case, the complaints made by the wife must be judged in the context in which the various matters arose. Having regard to what was laid down in *Buchler v. Buchler* (16), if the wife’s complaints in this case were viewed in isolation, it would appear obvious that mere lack of affection, even if accompanied by taunting remarks, could hardly be interpreted as conduct driving her away; but it may be that conduct of this kind, and words of this kind, may take on an entirely different significance when viewed against the background of the previous history of the case.

Apparently the justices reached their conclusion without referring to the notes of the evidence given at the previous hearing. It should be noted, however, as my Lord has pointed out, that both of them had been parties to a proceeding only a month or so beforehand, when they were members of a court dealing with a question of variation of quantum that had arisen in relation to the previous order. But the justices who decided this case had

(15) (Unreported): January 30, 1951 (16) [1947] P. 25.
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not been parties to the previous decision whereby the husband was adjudged to be a deserter; nor did they, apparently, as has been pointed out, refer to the matters that had been proved on that previous occasion. We thought it right, however, to ask for the notes of those previous proceedings, and they have been read to us; and I am bound to say that they have shed considerable light on the case. It transpires that on that occasion the wife's complaint against the husband (which equally on that occasion was decided in her favour) was based on the fact that the husband repeatedly said that he did not want her, that he frequently told her to go, and that he went on doing that notwithstanding that more than once after she had gone she tried to come back, and each time she did so she was again told to go.

With that background, it seems to me, the words complained of in this case take on quite a different significance. One has to ask oneself whether, with that background and in that context, words to the effect "I never asked you to come back" are capable of supporting the innuendo that the husband not only did not want the wife to come back, but that he actively wished her to go again; or, to use a phrase aptly used by Mr. Temple in argument, whether, in their context, they were capable of amounting to words of expulsion.

It is apparent on the evidence given and on the facts found that there was never any actual order on the part of the husband during the period from October 8 to October 17, 1950, for the wife to go. He never actually told her to clear out, and it is the fact that she did choose a moment when the husband was at work to slip away quietly from the home without telling him. So far as that goes, that circumstance would be consistent with the view that the husband not only had not asked her to go, had not ordered her to go, but did not want her to go. I mention that in passing, but I come back to the question which I have already posed: in the circumstances of this case were the words complained of in their context capable of being interpreted as words of expulsion and, in the circumstances, were the lack of affection and lack of consideration, which the husband is proved to have shown, capable of amounting to conduct expelling the wife? It is on that point, I am bound to say, that I have had the greatest doubt and hesitation in reaching my conclusion.

But I have come to the conclusion that, having regard to the circumstances, the husband's conduct and the words with which he accompanied it are capable of bearing the interpretation contended for, namely, that they were words or conduct of expulsion.

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if I may continue to use the phrase used by counsel. As I have come to that conclusion, it seems to me to follow that, if the words and conduct were capable as a matter of law in the circumstances of this case of bearing that interpretation, it was entirely a matter of fact for the justices to determine whether, in the light of the evidence, the husband did, in fact, mean by what he said and did that he wished the wife to go. They have clearly decided that issue of fact in favour of the wife and against the husband, and they have gone on to say that they did not believe in the sincerity of the husband when he afterwards made a show of inviting the wife to resume cohabitation. That is a finding of fact which the justices were entitled to come to, and one with which, particularly having regard to what was said by the Court of Appeal in *Pew v. Pew* (17), this court ought not to interfere. It follows, therefore, that I have come to the same conclusion as my Lord, albeit after a good deal of doubt and hesitation, and I agree that this appeal must be dismissed.

I would only like to add that I have attempted to determine this case on what I think is the proper basis, namely, that what happened on October 17, 1950, constituted a fresh act of desertion. I have not attempted to consider it on the basis that it was a revival of a previously condoned desertion. I express no view on the difficult question that has been argued before us with regard to the doctrine of condonation in relation to desertion. In my judgment, for the reasons I have given, that does not arise in this case, and need not be further considered.

With regard to the question of quantum, which has also been argued before us, I agree entirely with what my Lord has said.

Appeal dismissed.

Solicitors: *Ward, Bowie & Co., for A. V. Hammond & Co., Bradford; Young, Jones & Co., for James A. Lee and Priestley, Bradford.*

J. B. G.

(17) (Unreported): January 30, 1951 (C. A.).

[SOUTHWARK CONSISTORY COURT.]

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Mar. 7;
Apr. 20.*In re* ST. PETER ST. HELIER, MORDEN, AND
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Garth Moore.

Ecclesiastical law—Faculty—Stations of the Cross—Ten according to the Gospel and four non-scriptural—Devotional services performed before each of the fourteen in sequence—Purpose of services—Not objects of “superstitious reverence”—Legality.

A faculty was sought for the hanging or erection of ten Stations of the Cross depicting events in Our Lord's Passion which are recorded in the Gospels, and for four additional Stations to depict events which are not recorded in the Scriptures. The petitioners proposed that short services should be held before each of the Stations, either singly or in sequence, as an aid to meditation on the scene depicted and to prayer. The petitioners satisfied the court that the wording of the prayers to be used was doctrinally unobnoxious, wholly in accordance with the doctrines of the Church of England, and suitable in private devotions or at public prayer.

Held, that the Stations of the Cross were not, in themselves, unlawful, and that, where the court was satisfied, in regard to both the ten Gospel stations and the four non-scriptural Stations, that none of them was likely to be made, by the present petitioners, the objects of superstitious reverence or adoration, a faculty would issue, with the qualification that it would be effective only until further order to provide against the unlikely contingency that future changes might lead to the introduction of abuses.

Clifton v. Ridsdale (1875) 1 P. D. 316; *In re St. Mark's, Marylebone Road* [1898] P. 114; *Capel St. Mary, Suffolk v. Packard* [1927] P. 289 distinguished.

TWO PETITIONS for a faculty.

On March 7, 1951, a petition was heard by Chancellor Garth Moore in a Consistory Court of the Southwark Diocese sitting in the Almshouses Institute, Rochester Row, London, S.W., which was filed in connexion with Bishop Andrewes' Church, a chapel of ease, by the Rev. Frederick Livesay Godfrey, vicar of St. Peter St. Helier, Morden, the Rev. Jack Arthur Court, who was in charge of Bishop Andrewes' Church when the petition was filed but had since been succeeded by the Rev. Marshal McIntyre, who supported the petition, and by Henry Arthur Baker and Albert Wooden, two of the churchwardens.

The petition was for a faculty to hang a set of the fourteen Stations of the Cross in plaster relief in Bishop Andrewes' Church. Ten of the Stations depicted incidents in Our Lord's Passion

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recorded in the Gospels; three represented Our Lord falling beneath the weight of the Cross; and one the well-known story of Our Lord's encounter with St. Veronica. The Stations had already been temporarily placed without a faculty on window sills for the purpose of holding during Lent the service known as Devotions.

The second petition concerned the church of St. Olave, Mitcham, and was for a faculty for the purpose of erecting a set of Stations of the Cross depicting similar incidents to those of the first petition, and also for a memorial tablet inscribed: "The Stations of the Cross are dedicated to the glory of God and in memory of Harry John Andrew Rudolph, Vicar's Warden, 1928-1950". The Stations were also fourteen in number and were executed pictorially in relief. The petitioners were the Rev. Charles Vincent Bernard Haddelsey, the vicar at the time when the petition was filed, who had since been succeeded by the Rev. Alfred Duckett, who supported the petition, and F. E. Pailthorpe and J. R. Phipps, two of the churchwardens.

In each case the petition received the unanimous support of the parochial church council; in neither case was there any opposition; and in both cases the proposals had received the approval of the diocesan advisory committee.

In St. Olave's Church the Stations which were the subject of the petition had not been introduced, though they had been bought. Fourteen brown-paper crosses had, however, been attached to the wall of the church and were utilized for the purpose of a service similar to that used in Bishop Andrewes' Church and which was contained in a booklet entitled "Stations of the Cross", stated to be arranged for private use and containing pictures of the fourteen Stations.

The two petitions were heard together.

Geoffrey Hutchinson, K.C., W. S. Wigglesworth and Michael Chavasse for the petitioners. Before the recent war there were forty-seven churches in the diocese of Southwark which had sets of Stations of the Cross, ten of which were destroyed by enemy action. There is no opposition to the present petitions. On the evidence before this court there is nothing to show that any of the fourteen Stations for which a faculty is asked here will be used in a superstitious role. The decisions that followed *Clifton v. Ridsdale* (1) (which was heard in the Court of Arches) indicate

that that decision was misunderstood. In *Markham v. Shirebrook Overseers* (2) a faculty was granted for the removal of certain pictures known as Stations of the Cross where they had been placed without a faculty being granted. The chancellor in that case seemed to consider that Stations of the Cross were necessarily illegal, and he put too narrow a construction on the decision in *Clifton v. Ridsdale* (1). In a number of other cases it appears to have been decided that Stations of the Cross are not legal. The decisions were based on an interpretation of *Clifton v. Ridsdale* (1), which, in these days, ought not to be adopted, and were not justified by the language used by the Dean of the Arches, Lord Penzance, in *Clifton v. Ridsdale* (1). In *Capel St. Mary, Suffolk, Rector and Churchwardens v. Packard* (3) the Dean of the Arches was chiefly concerned with the removal of a number of church ornaments, and the use of lights at certain times in the services held there. Exception was also taken to the character of the services held, but it is not clear from the report of the case what the services were. They were there considered from the point of view of legality or illegality. The services referred to in the present petitions are not to be found in the book of common prayer, but there is no evidence that any unlawful services were ever held in the churches in question.

[THE CHANCELLOR. Unless they are authorized they must be illegal.]

Mere absence of express authority does not necessarily make a service illegal: there must be present some matter which is obnoxious to the doctrines of the Church of England. *Clifton v. Ridsdale* (4) is the only authority binding on this court, and it would seem that the Dean of the Arches there never intended to rule that Stations of the Cross were necessarily, in themselves, illegal. What he did decide was that where ornaments are used for superstitious purposes they are not lawful. There was no argument in that case on the question whether Stations of the Cross were lawful or unlawful. This court should ask itself what the possibilities are in these particular parishes that the Stations will be approached in a spirit of superstition. It is submitted that there is no evidence here of that use being made of the Stations. Cribs are commonly introduced in Anglican churches, and the clergy find considerable advantage in them as an inspiration to prayer and to meditation at Christmas, particularly where children are concerned. If it were held to be illegal to have

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(1) 1 P. D. 316.

(2) [1906] P. 239.

(3) [1927] P. 289.

(4) 1 P. D. 316.

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Stations of the Cross, the introduction of cribs would automatically be excluded.

[THE CHANCELLOR. If I come to the conclusion that the crux of this question is whether the Stations of the Cross are approached in any spirit of superstition or serve merely as an inspiration and aid to prayer, and if I decide to grant a faculty, there still remains the question whether the faculty shall permit the use of ten or fourteen Stations.]

There are fourteen aspects for meditation of the Passion of Our Lord: ten of them are written in the Gospels and four are founded on tradition. Tradition says that there were seven falls, of which one at most is recorded in the Gospels. There must necessarily have been more than one fall. The translation of the Greek version suggests that Our Lord was "carried" into Golgotha; not merely "brought". There is a story that Saint Veronica "wiped His brow", an act that would probably have been done more than once in such circumstances. It is submitted that it would be wrong for the court to grant a faculty for the use of ten Stations and to refuse a faculty for the additional four. If we deny that Our Lord suffered as a human being, we deny His humanity. It is submitted that the court is not bound by any decisive authority to refuse a faculty in the circumstances of the present cases and that the petitioners are entitled to a decree.

Cur. adv. vult.

April 20. CHANCELLOR GARTH MOORE, reading his judgment, stated the facts and continued:—Three main questions arise for determination, namely: (1.) Are the proposed Stations æsthetically satisfactory? (2.) Can they, or any of them, be lawfully introduced into a church? and (3.) if the answer to the first two questions is in the affirmative, ought they, or any of them, to be so introduced in the circumstances of these particular cases?

The first question I can answer at once. Pictures of the Stations have been put in and I am in agreement with the advisory committee and hold that, on purely æsthetic grounds, the proposals are satisfactory.

The second question regarding their legality is a far more difficult one. Before turning to a consideration of the authorities it may be useful first to examine the matter without reference to decided cases.

Had I not been aware of the body of opinion to the contrary, I would never have doubted the legality of, at any rate, the ten Gospel Stations. Save during the period of Puritanical excesses,

it has been customary to embellish churches with all sorts of decorations, both pictorial and sculptured, notably, but not exclusively, in the form of stained glass windows. The object of such decorations is a two-fold one, namely, to give glory to God by beautifying His houses, and as aids to devotion. A frequently recurring theme in such decorations is the representation of some scene in the life of our Lord. It is true that such decorations, like almost everything, are capable of being abused, and the likelihood of abuse is a factor to take into consideration in deciding whether or not in any given case they ought to be introduced. That, however, is a matter which falls to be considered as a matter of discretion and only after the question of legality has been decided. It is with the legality of such decorations that I am at the moment concerned, and in general I can see no ground for impugning their legality. Nor can I, on the point of legality, see any ground for differentiating between Stations of the Cross and any other pictorial or sculptured representations.

It is often stated that Stations of the Cross are a post-Reformation innovation. Even if the statement were true, I do not see why that should be regarded as militating against their legality or even against their desirability. It is not an argument which is ever employed against the introduction of many other things which were unknown before the Reformation, such as electric light fittings, central heating or pictures of boy scouts in those usually unhappily conceived and untidy places known as children's corners. Furthermore, the statement that Stations of the Cross are post-Reformation is not wholly accurate. In one form or another they were known before the Reformation, and Mr. Hutchinson has reminded me that there was a set at Nuremberg in the fourteenth century. It is, however, true to say that in their present form and in the form in which they are proposed in the present applications they are post-Reformation and were in use in the Roman Church before it occurred to anyone to introduce them into a church of the Anglican Communion. In the Roman Church they have been used as a substitute for a pilgrimage to the actual Via Dolorosa in Jerusalem; and, because in the Latin Church (to use a term which in this context at least is common and preferable) the Franciscans are the guardians of the Holy Land, in post-Reformation times the Stations of the Cross were at first peculiarly associated with the Friars Minor, though, in recent years, their popularity has been such that their use has spread far beyond the confines of places administered by the Friars.

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Once again, however, on the question of legality, these considerations, though interesting, seem to me to be irrelevant. The fact that the Church of Rome does something is by itself no reason why the Church of England should not also do it. Indeed, in these days, when suspicion is less strong, and there is what might be described as an œcumenical feeling in the air, one might have thought that the more one could find in common between the severed parts of Christendom the better. I emphasize that I am not at the moment considering the use to which these decorations are put by the Roman Church or to which they might be put if introduced into these two English churches. I am considering merely the question of their intrinsic legality, and, on this point, if the matter were free from authority, I should certainly hold that Stations of the Cross were lawful.

But the matter is very far from being free from authority. There is a formidable volume of decided cases of such a nature as to cause the stock text-books to state that Stations of the Cross are not lawful. It is the contention of the petitioners that this conclusion of the text-books is wrong. It is, therefore, necessary to examine the authorities in detail.

The first in point of time and also the most important is *Clifton v. Ridsdale* (5), decided in the Court of the Arches and, therefore, binding on me. The headnote to that case states that Stations of the Cross "are decorations forbidden by law in "churches of the Church of England", and that summary of the decision has usually been regarded as correct. As Mr. Hutchinson has pointed out, that case was not a faculty case. It was a case in which proceedings were brought against the Rev. Charles Joseph Ridsdale under the Public Worship Regulation Act, 1874, in respect of a number of alleged unlawful acts of a varied nature including the wearing of vestments, the mixing of water with wine, the use of wafer bread, the manner of conducting services, and the introduction of various articles into the church. The twelfth charge was in respect of the introduction without a faculty of a set of Stations of the Cross, "such as are commonly used in "Roman Catholic churches".

Referring to this charge, the Dean of the Arches, Lord Penzance, said (6): "The first objection taken to them I must hold "to be a fatal one, namely—that they constitute 'an addition to "the fabric ornaments or furniture of the church' within the "meaning of the statute, and have been set up in the church by

(5) 1 P. D. 316.

(6) Ibid. 359, 360.

“ the respondent ‘ without lawful authority ’, no faculty having
 “ been either granted or applied for to justify their erection. The
 “ law which requires that those who wish to fix or set up any new
 “ decoration in a church must apply to the proper authorities for
 “ a faculty before they do so, is very salutary and ought to be
 “ upheld. . . . It is upon this ground, therefore, that I shall
 “ order their removal ”. I pause there to note that the objection
 which Lord Penzance found to be fatal to those Stations of the
 Cross was that they had been introduced without a faculty, and
 it was on that ground that he ordered their removal, and that,
 so far, no basis is given to the statement in the headnote that
 they “ are decorations forbidden by law ”.

Once the Dean had stated that the ground on which he was
 ordering their removal was that they had been introduced without
 a faculty, anything further which he said, though deserving the
 most careful study, was purely obiter and not of binding authority.
 His judgment, however, continued and dealt with the allegation
 that they were decorations forbidden by law, and in respect of that
 allegation he said, “ . . . as they now stand I think they are ”.
 In this connexion he pointed out that neither the three falls nor
 the story of St. Veronica had any warrant in Gospel history, and
 he further went on to discuss the use to which Stations of the
 Cross were put in the Roman Church, including the obtaining of
 indulgences. It is this part of the judgment which alone lends
 some support to the sweeping condemnation of Stations of the
 Cross contained in the headnote. But on analysis, I do not think
 that Lord Penzance was any longer dealing with the question of
 the intrinsic legality or otherwise of Stations of the Cross: he
 was dealing with the third question which arises in all these
 cases, namely, whether in the circumstances of the particular case
 then before him the Stations ought in fact to be introduced. In
 this connexion it is highly significant that the Dean continued (7):
 “ I shall, therefore, as I have above said, order their removal,
 “ leaving it open to the respondent, if he shall desire it, to apply
 “ for a faculty to authorize the introduction into his church of
 “ such of them as may turn out to be free from objection ”. It
 seems to me, therefore, impossible to regard *Clifton v. Ridsdale* (7)
 as authority for the proposition that Stations of the Cross are
 necessarily and intrinsically unlawful, and I do not think that
 that was what Lord Penzance intended to decide.

The next case in point of time cited was *In re St. Mark's*,

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Marylebone Road (8), in which the Chancellor of London, Dr. Tristram, ordered the removal of a set of Stations of the Cross which, together with other things, had been introduced into the church without a faculty and contrary to the vote of the Vestry and the wishes of the parishioners, and which the chancellor found had given the greatest offence to the parishioners and had been used superstitiously. I am for the moment concerned only with the question of the intrinsic legality or otherwise of Stations of the Cross and, therefore, I reserve comment on the finding that the Stations had been used superstitiously. On the question of intrinsic legality, that decision is no authority either one way or the other, and with its result, although it is not binding on me, on the facts of that particular case, I respectfully agree.

The next case is *Davey v. Hinde* (9), which was also heard by Chancellor Tristram, in the consistory court of Chichester. There the chancellor ordered the removal of a set of Stations of the Cross, although they were already in the church at the time of its consecration. Evidence was given of the type of service which was performed before these Stations and when considering the evidence the chancellor said (10): "From the above evidence "it is patent that the purpose for which the Stations of the "Cross are in this church is to enable a service to be celebrated "there, which is prescribed by and in use in the Church of Rome, "but which is in contravention of the doctrines and practice of "the Church of England. It is, therefore, imperative on the "court, following the decisions of the Arches Court and of the "Judicial Committee in the *Ridsdale* case (11) to make an "order for their removal". From this it seems to me to be clear that the learned chancellor was not purporting to decide the question of the intrinsic legality or otherwise of the Stations (which is still the only point with which for the moment I am concerned): he was ordering their removal because of the use to which they had in fact been put.

In *Markham v. Shirebrook Overseers* (12) Chancellor Kempe, sitting in the consistory court of Southwell, made an order for the removal of fourteen Stations of the Cross which had been introduced into the church without a faculty. It does not, however, seem to me that he at any point decided that Stations were necessarily unlawful or, indeed, that he ever seriously directed his mind to the question. The sole basis of his decision appears

(8) [1898] P. 114.

(9) [1901] P. 95.

(10) Ibid. 118.

(11) 1 P. D. 316.

(12) [1906] P. 239.

to be that in his judgment the Stations in question there had been put to unlawful uses and were likely, if left, to be put to such uses again. That is an aspect of the case which calls for more detailed consideration, but at the moment I am concerned only with the question of intrinsic legality or illegality and on that point one receives no guidance from this decision, which was founded on the chancellor's view that the uses to which those Stations had been put, and were likely to be put, were superstitious uses within the chancellor's understanding of the interpretation placed on that expression in *Clifton v. Ridsdale* (11).

Vincent v. St. Magnus the Martyr, etc. (Rector and Churchwardens) (13) began in the consistory court of London, where Chancellor Erington refused to grant a faculty for Stations of the Cross. His judgment unfortunately was not reported, but an extract from a typescript copy was read to me by counsel. The case went to appeal on other points and the judgment of the Dean of the Arches, Sir Lewis Dibdin, on these other points is almost essential to a proper understanding of *Clifton v. Ridsdale* (11), and I shall return to it later. The refusal, however, of a faculty for Stations of the Cross, as well as being unreported, was not appealed against, and so was never the subject of a judgment in the Arches Court and, therefore, it is not binding on me.

The last case which it is necessary to consider in connexion with the legality of Stations of the Cross is *Capel St. Mary, Suffolk, Rector and Churchwardens v. Packard* (14). In that case Chancellor North in the consistory court of St. Edmundsbury and Ipswich had ordered the removal of a number of objects from the church, among them a set of fourteen Stations which had apparently been put into the church without a faculty. On appeal to the Court of the Arches, Sir Henry Slesser, submitting that ten of the Stations might be retained, said (15): "It is admitted that a service has been used in connexion with the Stations of the Cross, and that the presence of the three pictures for which there is no scriptural authority cannot be defended. The Rector is prepared to undertake that no such service shall be held hereafter and to remove the said three pictures. It is submitted that the rest may remain".

It is interesting in passing to note that only three and not four of the pictures were admitted to be without scriptural authority, and I assume that Sir Henry Slesser was submitting that there is

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(11) 1 P. D. 316.

(13) [1925] P. 1.

(14) [1927] P. 289.

(15) Ibid. 295.

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scriptural authority for one fall. Sir Lewis Dibdin, however, in dealing with this submission, held that all fourteen should be removed and when giving his ruling said (16): "Fourthly, the " Stations of the Cross, consisting of the whole series, including " the St. Veronica picture. The Rector admits that the services " and instructions known as the Stations of the Cross are held " and that lights are used ceremonially in connexion with them. " These pictures are illegal ornaments ".

That is emphatic language. The decision is, moreover, binding on me. If it means that Stations of the Cross are necessarily illegal, that is an end of these present two cases. Furthermore, it would be entirely wrong for me, in the face of such language, in such a quarter, to accede to any argument to the contrary unless the most careful examination were to drive me to the conclusion that by these words the Dean of the Arches did not intend to rule that Stations of the Cross are necessarily and in all circumstances illegal. The context in which these words were used must, therefore, be scrutinized very carefully.

The first thing to note is that the articles in question there had been introduced without a faculty; and that the Dean specifically refers to the manner in which they had been used. We are not, unfortunately, given much information in the report as to how exactly they had been used; but it is clear from the rest of the case that illegalities of one sort or another were rife in that particular church. In any event, if the Dean had meant to rule that Stations of the Church were intrinsically unlawful, the use to which they had been put was irrelevant and would not have been mentioned.

The next thing to note is the list of three cases which the Dean cited in support of his ruling. One of them was *In re Christ Church, Ealing* (17), which had nothing to do with Stations of the Cross as such and, in so far as it is relevant at all, is relevant with regard to the principles on which sculptured decorations are admissible. Another of the cases cited was *Clifton v. Ridsdale* (18) which, as I had said, is not, I think, authority for the proposition that Stations of the Cross are necessarily illegal. In that case they had been introduced without a faculty and in so far as they came under further condemnation, they did so by reason of the use to which it was then thought they were likely, in that particular case, to be put, and it was expressly indicated

(16) [1927] P. 287, 306.

(17) [1906] P. 289.

(18) 1 P. D. 316.

that at a later date a faculty for some at least of the Stations might be sought. The third case cited was *Markham v. Shirebrook Overseers* (19), in which again, as I have indicated, in my view the sole reason given for bringing the Stations under condemnation was because of the use to which it was thought they were likely to be put.

Bearing in mind these matters and how important it is not to divorce judicial pronouncements from their context, I have come to the conclusion that when, in the *Capel St. Mary* case (20), Sir Lewis Dibdin said, "These pictures are illegal ornaments", Sir Lewis did not intend to rule for all time against Stations of the Cross as such (which would constitute a departure from the attitude of Lord Penzance in *Clifton v. Ridsdale* (18)); he intended merely to indicate that in the circumstances of the particular case then before him the retention of the Stations could not be sanctioned. In other words, if the Dean had been sharply distinguishing, as I am, between the question of the intrinsic legality or otherwise of such articles, and the question whether, in the particular case, they ought to be permitted, while he would have answered the latter question in the negative, it by no means follows that he would so have answered the former question. After the most careful consideration and, I hope, in complete loyalty to the decisions of the Court of Arches, I am of the opinion that the *Capel St. Mary* case (20) on examination is not an authority for the proposition that Stations of the Cross are intrinsically illegal.

I have now reviewed all the cases cited to me on this question of intrinsic legality or illegality and I do not find anything which binds me to hold that such articles are intrinsically unlawful. I therefore continue in the opinion at which I had arrived without recourse to the authorities, and I hold that Stations of the Cross are not in themselves unlawful.

I turn, then, to the third question, namely, whether in the particular cases now before me these Stations or any of them ought to be introduced, and this involves the question whether, if they are introduced, they are likely to be put to improper uses or, to employ the technical language forced upon me, whether there is danger of their becoming objects of superstitious reverence.

I have no doubt that, if the Stations are permitted to be introduced as permanent or semi-permanent additions to these two

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(18) 1 P. D. 316.

(20) [1927] P. 289, 306.

(19) [1906] P. 239.

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churches respectively, they will continue to be used as in the one case they have hitherto been used, and as in the other case the brown-paper crosses have been used. They will continue to be used like that, at any rate so long as Mr. McIntyre and Mr. Duckett are each at his respective church. Services will be held in which at each Station meditation will be invited on the scene depicted and the prayers contained in the two booklets, which have been produced before me, will be offered to the Almighty. It is also probable that private individuals will make their private devotions in much the same way. In addition, the roaming eye of the casual observer will sometimes alight on one or more of these representations and sometimes a meditation on the scene depicted may flow therefrom. Furthermore, the churches will be embellished by these additions. Is there anything in all this to which exception can be taken?

It is, I think, necessary to consider this question first with regard only to the ten Gospel Stations, leaving out of account the representations of the three falls and of the story of St. Veronica.

I have considered the two booklets most carefully. One contains the prayer for the souls of the faithful, which I take to mean the faithful departed, and in some quarters exception might be taken to such a prayer; but I hold that there is nothing therein contrary to the doctrine or law of the Church of England and I need cite no further authority for that than the *Capel St. Mary* case (21). Apart from that prayer there is nothing to which even the most censorious could take exception simply in the actual language of the devotions contained in these booklets. Chancellor Kempe in *Markham v. Shirebrook Overseers* (22) seems to have regarded the prospect of private devotions as being peculiarly suspect, but only, I think, because he thought that all devotions in that particular church would be tainted by superstition; but I am quite sure that the prayers in the two booklets which I am considering could be recommended for private devotion as being wholly in accordance with the doctrine of the Church of England.

If then, as I hold, these devotions are of such a character that they may be employed by any loyal Anglican privately, do they assume a different character if they are used as a service in a form of public worship? The answer, I think, is that in themselves they remain unobnoxious. Their use in public worship,

(21) [1927] P. 289.

(22) [1906] P. 239, 254, 257.

however, might be challenged on another ground, in that the minister who takes the service, if a clerk in Holy Orders, might be guilty of a breach of the declaration required by Canon 36 and also by the Clerical Subscription Act, 1865, namely, in public prayer to use the form prescribed in the Book of Common Prayer "and none other, except so far as shall be ordered by lawful authority". No one, not even in the House of Lords, knows what those words mean (see Lord Davey's observations in *Rossi v. Edinburgh Corporation* (23)), nor shall I now pause to inquire. Vaisey, J.'s Memorandum (to be found at p. 215 in *The Canon Law of the Church of England*) is sufficient for me. Let it suffice to say that, since the wording of these devotions is doctrinally unobnoxious, they could properly be ordered by lawful authority (whoever or whatever that is in each particular case) for use in public prayer. There can, therefore, be no reason on this ground why I should withhold a faculty. If hereafter any clerk in Holy Orders should use this or any other form of public prayer not ordered by lawful authority, there are proceedings of a different nature by which he can be restrained.

But there still remains the question of whether these devotions, unobnoxious in themselves, are to be viewed differently if they are performed either before a single Station or in sequence before each of the Stations in turn. Do they thereby partake of the nature of the worshipping or adoration of images contrary to the 22nd Article of Religion and, therefore, come under condemnation as superstitious reverence? In ordinary parlance they clearly do not. No one could for a moment imagine that anybody would attach the slightest sanctity to any of these representations themselves. But I have to interpret the unfortunate expression, "superstitious reverence", in the light of what Lord Penzance said about it in *Clifton v. Ridsdale* (24). He said that it was not intended "by the use of the words 'superstitious', 'reverence', 'adoration', or 'worship' to convey only the limited idea of a figure or object itself worshipped like a Pagan idol. On the contrary", he continued, "I understand these expressions as intended to embrace the far more extended conception of worship, adoration, or reverence paid to the Deity in presence of or before those objects or figures. It may not be easy to push definition further than this, and define what it is that in any, or every case, constitutes adoration or worship in presence of an image or figure; nor is it necessary to do so;

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(23) [1905] A. C. 21, 29.

(24) 1 P. D. 316, 352.

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“ it is enough for the purpose in hand to say that it must be taken
“ to include all and every form or degree in which the object in
“ question is made to take a place, or play a part, in the
“ devotions which are paid to the Deity before it ”.

Those are hard words and, so far as I am concerned, binding words. Were they really intended to dub with the taint of superstition every act of devotion inspired by and in the presence of some pictorial or sculptural memorial of our faith? I do not think so. As Chancellor Kempe observed in *Markham v. Shirebrook Overseers* (25) all pictorial representations must necessarily serve the purpose of reminding observers of the events portrayed. If so narrow a construction were placed on Lord Penzance's words, it would be impossible to have a crucifix at the place where confessions are wont to be made, a practice for which there is now ample authority, including the judgment of Sir Lewis Dibdin in the *Capel St. Mary* case (26). Lord Penzance himself obviously found it difficult to put into words exactly what he meant, as the passage quoted shows. He certainly intended to rule that the error of superstition could be manifested by acts which fell short of the actual adoration of an image. To attribute to an image any intrinsic sanctity would probably fall within the scope of his condemnation: so probably would also the belief that any special grace flowed from the doing of an act in the presence of an image. Thus he would have condemned as superstitious the Roman teaching with regard to the indulgence to be gained by performing devotions in the presence of Stations of the Cross. But he would not, I think, have wished to be taken to condemn the use of a picture for the purpose of putting the worshipper in mind of something on which a meditation may profitably be made. Whatever may have been the case in the nineteenth century or in any of the authorities which have been cited, I am completely satisfied that in the cases before me the sole purpose for which these Stations are intended and to which they are likely to be put is, as Chancellor Kempe would say, the one they must necessarily serve, namely, that of reminding observers of the events portrayed, with the wholesome result of stimulating meditation on those events. I, therefore, hold that there can be no valid objection to the ten Gospel Stations.

The non-scriptural ones, however, require further consideration. Nor are they all on an equal footing with each other. They have this in common, that none is recorded in the Bible.

(25) [1906] P. 239, 255.

(26) [1927] P. 289, 302.

That, in itself, can clearly not be conclusive. There are many undoubted historical facts which are nowhere recorded in the Scriptures. A more serious objection to the four Stations which I am now considering is that the historical foundation of the events depicted is doubtful. Even that is not necessarily fatal. If it were, we could have in our churches no representation of St. George killing the dragon, or of St. Christopher carrying the infant Christ. The real difficulty is that these four Stations, non-scriptural and of doubtful historicity, are presented on terms of apparent equality with the ten Gospel Stations and therefore might be taken to have received the sanction and to convey the authoritative teaching of the Church. This is a serious objection: it is necessary to see how serious.

Mr. Wigglesworth has pointed out that, whereas the authorized version of the Bible in Mark, chap. 15, v. 22, reads "And they bring him unto the place Golgotha", the Greek reads *καὶ φέρουσιν αὐτὸν ἐπὶ Γολγοθᾶ τόπον*, and *φέρω* usually implies the idea of carrying. If that does not suggest that Our Lord fell, it certainly suggests that He required support and was stumbling. It is for this reason, I suppose, that my predecessor, Sir William Hansell, felt able to grant, as I am told he did, a faculty for Stations which included one, but not more than one, fall. I find it difficult, however, to swallow the camel of one fall while straining at the gnat of more than one fall. If it is conceded that Our Lord was stumbling and in need of support, it does not seem to me to matter very much precisely how that is represented pictorially. Were it to be represented as a continuous sequence in the form of a religious play or film, instead of, as here, in what I believe are known as "stills" from such a sequence, I do not think that any serious point would be taken as to the number of times Our Lord was represented as falling, and Mr. Wigglesworth tells me that the pre-Reformation Stations at Nuremberg contain representations of seven falls.

But these arguments cannot be applied to the representation of the incident of the meeting with St. Veronica, which rests solely on tradition. Mr. Wigglesworth has ingeniously argued that it quite likely happened; that at the worst it is an edifying story and that at the best it is true. This argument, I think, refers only to the meeting and not to its sequel, the miraculous imprint of Our Lord's features on the cloth with which in the case of both the sets of Stations under consideration it is clearly linked, for in both sets the miraculous imprint is depicted. I do not presume to pass judgment on the veracity or otherwise of these stories.

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The Church of England gives no authoritative teaching either way on the matter. The question here, as with the representations of the falls, is whether it is right for such things to be displayed in the context of the Gospel story as though they were on the same authoritative level as the other incidents depicted.

I am bound to say that I have been much exercised by what the answer should be. On the one hand I should very much prefer to see the Gospel story unfolded pictorially in all the grim simplicity of the Scriptures without additions of a disputed nature. On the other hand I am loth, even indirectly, to interfere with the teaching functions of the clergy to whom that responsibility is entrusted, unless the teaching in question is clearly contrary to the teaching of the Church. I am also aware that the full set of fourteen Stations is nowadays to be found throughout the world in churches outside the Church of England but within the Anglican communion as well as in churches of the Roman communion. I am reluctant to do anything, in however small a matter, which would appear to create yet another point of obligatory differentiation between the Church of England and other branches of Christendom. In the result, though only with great hesitation, in these two cases I have decided not to place a veto on any of these four non-scriptural Stations. In reaching this conclusion I am influenced in part by the form in which I propose to make the order which will provide some check on the manner in which the Stations are used; and I am also partly influenced by the fact that there has been no opposition, archidiaconal or parochial, to these petitions which would seem to indicate that in responsible quarters no fears are entertained and in the parishes no sentiments are outraged.

I therefore decree that in each of the cases a faculty shall issue in the full form as prayed, but I further decree that this shall be only until further order. I do not anticipate any abuse of these Stations, but a decree in this form provides a useful additional safeguard should conditions in the future change. It is, I am told, a form of order which commended itself in this court to Chancellor Hansell and it has received the emphatic approval of the Dean of the Arches in the *St. Magnus Martyr* case (27). Where, as here, the major part of the expenditure has already been incurred, there can be no objection to such an order and, on many grounds, much to commend it.

I wish to add just this:—In Cripps on Church and Clergy

(8th ed.), at p. 237, Stations of the Cross are included among the ornaments which are "without question" illegal; and that is a view which has been very widely shared, though, if it is right, it places under condemnation many good Anglicans and the many churches where Stations are now to be found. Out of deference to this view, however, I have thought it necessary to examine the whole matter very fully and to give my reasons at considerable length. I believe that the conclusion at which I have arrived will be found to be in accordance with the authorities when carefully examined, and I am strengthened in that view by the knowledge that in recent years other Chancellors have sometimes found it possible to permit the introduction of Stations of the Cross, though their decisions have not reached the reports. I think that one of the chief reasons why it has been so widely thought that Stations of the Cross are illegal is because two questions have tended to become confused, namely, whether or not they are intrinsically illegal, and whether or not they are in any given case likely to be put to illegal uses.

As I have said, an examination of the decisions has led me to the conclusion that it has never been authoritatively decided that Stations of the Cross are intrinsically illegal, and in the two cases before me I am satisfied that they are not likely to be put to illegal uses. It is, therefore, a matter for my discretion whether or not faculties should issue. In the exercise of that discretion I have decided that in these two cases faculties may issue. It does not follow that in other applications and in different circumstances I should exercise my discretion in the same way. Nor is it surprising that in these two cases, in the twentieth century, I should have exercised my discretion more readily and more favourably than courts were wont to do in the nineteenth century. Circumstances are very different now from then, and the courts were probably wise in their generation to move cautiously. But we must not mistake the cautious use of their discretion in something which concerns merely the trappings of religion for an authoritative and immutable ruling on a matter of principle. The basic principles which guide the Church are unchanging. But, within the framework of those principles, the Church in her wisdom adapts herself and her trappings to ever-changing conditions. She is the Body of Christ, and the Body of Christ is not a mummy: it is a living organism. It is not a mummy, held together only by the restricting folds of a winding-sheet which permit of no further changes than those wrought by slow decay: it is a living organism requiring freedom to grow and

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move; and, when the clothes of yesterday no longer fit, it is as well to discard them. The reformers of the sixteenth and seventeenth centuries had no doubt of this, and we in the twentieth century should bear it in mind when interpreting the decisions of the nineteenth century: they must never be considered out of the context of the conditions in which they were reached. This is nowhere more clearly stated than by the Dean of the Arches in the *St. Magnus the Martyr* case (28). It is in accordance with my understanding of what was there enunciated that I have based my decision.

Faculties decreed accordingly.

Solicitors: *Trollope & Winckworth.*

H. G.

(28) [1925] P. 1, 11, 12.

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Husband and wife—Divorce—Cruelty—Constructive desertion—Principles concerning natural consequences of conduct—Principles governing appellate court on questions of fact.

The maxim that a man must be taken to intend the natural consequences of his conduct is applicable in matrimonial causes provided always that it is not taken to express an irrebuttable presumption of law and that it is only applied in connexion with conduct which can fairly be described as ill-treatment.

Edwards v. Edwards [1948] P. 263 followed.

Buchler v. Buchler [1947] P. 25 applied.

Boyd v. Boyd [1938] W. N. 336; 55 T. L. R. 3 disapproved.

Judgment of Denning, L.J., in *Hosegood v. Hosegood* (1950) 66 (Pt. 1) T. L. R. 735, 737–40 dissented from.

Quære, how far, in connexion with cruelty and the kindred offence of “constructive” desertion, expressions such as that the conduct complained of must be “aimed at” the aggrieved spouse, and not merely be “the development and manifestation of the” offending spouse’s “character acting in its own sphere”, are to be regarded as expressing a doctrine of universal application.

The “danger of trying to formulate principles of law out of “particular circumstances in particular cases, and then treating “those principles of law as being explanations or riders to the “actual statutory language” (*Allen v. Allen* (unreported) Feb. 1, 1951 (C. A.)) considered.

Quære, also, at what point, in relation to the limits laid down by the House of Lords in “*Hontestroom*” v. “*Sagaporack*”;

"*Hontestroom*" v. "*Durham Castle*" [1927] A. C. 37 and *Watt (or Thomas) v. Thomas* [1947] A. C. 484, on the right of an appellate tribunal to differ from the trial court, the line is properly to be drawn between interference with findings of fact, and holding that there has been a misdirection because those facts do not, in law, constitute the offence charged.

The decisions of the Court of Appeal in *Clark v. Clark* [1950] W. N. 489, and *Pew v. Pew* (Jan. 30, 1951, (C. A.) unreported) applied.

Per Karminski, J.: The words of the statute, "has treated the "petitioner with cruelty", provide the true test when they are examined and applied in the light of the guidance afforded by the Court of Appeal. In cruelty cases in particular, once the guiding principle is established, its application depends upon a careful examination of the facts of each particular case. Once the facts are established, the question is whether this particular class of conduct by this man to this woman in all the circumstances of their married life is cruelty.

APPEAL from Kingston-on-Thames justices, who had made an order on the ground of persistent cruelty.

The following summary of the case put forward by the parties is taken from the judgment of Lord Merriman, P.:—The wife's case may be summarized briefly as follows:—The husband had kept her short of money in spite of a solicitor's letter and until the local probation officer had intervened; he had closed the account at the stores at which she was accustomed to deal, without informing the wife that he had done so, in such a way as to humiliate her; he had "made her life a hell", in support of which she said that he had compelled her to keep an account of her household expenses; he used to keep food which he had bought for himself locked up in the garage, and had on more than one occasion brought food and asked her to cook it for him—"an egg, but he did not get one for me"; he had refused to take her for a holiday or to take her out in his new car; he had put the purchase of the car, partly used for his municipal duties, before the provision of new curtains or furniture for the home; generally speaking, he neglected her by staying out of the house, except at week-ends, from the time he left in the morning until 11 o'clock at night, and was taciturn and unfriendly and took no notice of her; there was no affection or love and, as his own evidence showed, he had not realized that their unhappy relationship was telling on her health; and he had told her to go on several occasions, one of which was quite recent. She added that when she had been in bed for three days during the war the husband had never gone near her. On the other hand, it was

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admitted that there had been no violence of any kind. In conclusion the wife said that she was very unhappy and that the only thing she could do was to go away.

Accordingly she proposed to leave him in order to go and live with the youngest son, an architect, who was about to acquire a flat. No question of constructive desertion arose because at the time of the hearing the parties were still living together. On the other hand, she said more than once that the whole trouble was over money, though she had 3*l.* a week for the last two years for housekeeping money in addition to 1*l.* a week from the son for his keep, the husband paying rent, rates, taxes, electricity and gas. She also admitted that sexual intercourse had ceased three years ago when she withdrew into a separate bedroom after an attack of influenza.

In other words, generally speaking her complaint was of stinginess, lack of affection and attention, callous indifference, taciturnity and selfishness. The architect son, who lived in the matrimonial home, was called to corroborate her evidence. He said that the condition of the furniture was such that he refused to bring his friends home. He corroborated the allegations that the husband had no conversation either with him or the wife, that he did not remember the husband ever taking the wife out, that he had seen him producing food for himself without offering any to the wife or to him, and that there was no affection or love between him and his father or between his father and his mother; that he had no wish for his friends to meet the husband, and that the whole of his affection was for the wife and the rest of the family.

The husband's version of the facts was, briefly, that he had treated his wife as he himself was treated by her.

The justices stated the reasons for their decision as follows:—

“ 1. The court believes the wife and accepts her evidence of
“ her husband's conduct and the state of affairs in the home.
“ The corroboration offered by the son is also accepted by the
“ court.

“ 2. The court is satisfied that the husband's conduct was
“ wilful. The various acts of the husband over a long period
“ were intentional and he should have been able to foresee that
“ the result would be misery and pain to the wife.

“ 3. The court is satisfied after considering the authorities
“ that the acts of the husband as outlined by the wife constitute
“ cruelty.

“ 4. The court is satisfied that the wife’s health has suffered
 “ as a result of the husband’s conduct, and a continuance of the
 “ present circumstances cause a reasonable apprehension of
 “ danger to her mental and bodily health ”.

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They accordingly made an order in the wife’s favour, and the husband appealed.

Roger Ormrod for the husband. There is no reported case which covers the present facts, i.e., one in which the injured spouse merely proves injury to health arising from conduct by the other spouse which amounted to no more than a degree of parsimony, coupled with a generally disagreeable disposition. It is therefore necessary to examine the authorities on cruelty, and, in particular, to attempt to reconcile the decisions in the Court of Appeal in *Lauder v. Lauder* (1) and *Squire v. Squire* (2), on the one hand, with *Westall v. Westall* (3) and *Kaslefsky v. Kaslefsky* (4), on the other hand. This necessitates an analysis of the meaning of the phrase “ aimed at ” in the latter cases.

It is submitted that this phrase was used to draw a distinction between acts done directly to the complaining spouse, which in fact caused injury to health but without any malign intention, as in *Lauder v. Lauder* (1) and *Squire v. Squire* (2), and acts of a more general nature done equally without intention to injure but in fact causing injury as in *Kaslefsky v. Kaslefsky* (4) and *Westall v. Westall* (3).

It is submitted that the effect of these decisions may be summarized as follows:—(a) Any kind of conduct which is proved to have caused injury to the health of the other spouse, or a reasonable apprehension of such injury, will amount to cruelty in law if such conduct is shown to have been intended to inflict pain or misery on that spouse. (b) In the absence of such intention only acts which are done directly to the other spouse can amount to cruelty in law.

To prove cruelty, it is not enough merely to prove conduct which in fact causes injury to health: see *Horton v. Horton* (5), where Bucknill, J., said (6): “ mere conduct which causes injury “ to health is not enough ”; *Buchler v. Buchler* (7), where Asquith, L.J., referred (8) to the “ reasonable wear and tear

(1) [1949] P. 277.

(2) [1949] P. 51.

(3) [1949] 65 T. L. R. 337.

(4) Ante, 38.

(5) [1940] P. 187.

(6) Ibid. 193.

(7) [1947] P. 25.

(8) Ibid. 45, 47.

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“ of married life ”; and *Usmar v. Usmar* (9), where Willmer, J., said (10): “ It is clear there must be something in the nature “ of wilful and unjustified interference by one spouse in the “ sphere of life of the other spouse ”: see also *Evans v. Evans* (11).

Intention to injure is, however, enough to convert conduct not cruel in itself into cruelty: see *Birch v. Birch* (12), where it was held that ill-treatment of a child for the express purpose of wounding the feelings of the mother is cruelty. But see *Suggate v. Suggate* (13), which was, however, merely a decision on pleading.

Lissack v. Lissack (14) must be regarded as wrongly decided on this point.

See also the cases where it was alleged that adultery was ipso facto cruelty if injury to the wife's health followed: *Beauclerk v. Beauclerk* (15); *Cochrane v. Cochrane* (16); *Fenwick v. Fenwick* (17); *Litton v. Litton* (18).

Cruelty was found in cases where the husband had “ flaunted ” his mistress in the wife's face or in some similar way shown an intention to hurt her. See contra, however: *Thompson v. Thompson* (19), where the respondent, a clergyman, had debauched a girl and the wife's health had suffered as a result of the criminal proceedings which followed, and where cruelty was found. [*Green v. Green* (20) (drunkenness) and *Gardner v. Gardner* (21) (lesbianism) were also referred to.]

Finally, it is conceded that no such distinction of types of conduct is to be found in *Russell v. Russell* (22). This is because intention to injure was admitted. Until *Horton v. Horton* (23), the need to draw distinctions did not arise because in previous cases there was evidence of serious injury to health and conduct of a direct kind (except *Thompson v. Thompson* (24)). The courts have hitherto been guided by the principles laid down in *Russell v. Russell* (22), but have been prepared to find injury to health or reasonable apprehension of injury in cases where the evidence proved relatively trivial injuries. As the standard of

(9) [1949] P. 1.

(10) Ibid. 9.

(11) (1790) 1 Hagg. Con. 35, 38.

(12) (1873) 42 L. J. (P. & M.) 23.

(13) (1859) 1 Sw. & Tr. 489.

(14) Ante, 1.

(15) [1891] P. 189.

(16) (1910) 27 T. L. R. 107.

(17) (1922) 38 T. L. R. 603.

(18) (1924) 40 T. L. R. 272.

(19) (1901) 17 T. L. R. 572.

(20) [1916] P. 188.

(21) [1947] W. N. 128; 63 T. L. R. 417.

(22) [1895] P. 315; [1897] A. C. 395.

(23) [1940] P. 187.

(24) 17 T. L. R. 572.

injury is lowered so the problem of differentiating between conduct of various kinds has become more acute. *Lauder v. Lauder* (25) and *Squire v. Squire* (26) represent the extreme beyond which the court should not go. The facts in this case fall well short of the facts proved in *Lauder v. Lauder* (25) and *Squire v. Squire* (26), and are comparable to those in *Kaslefsky v. Kaslefsky* (27).

C. G. Armstrong Cowan for the wife. The justices were entitled to reach their decision because the matter before them was one of fact. It was a question of fact whether the husband's conduct was wilful, whether it was intentional, and whether he should have been able to foresee that his conduct would cause his wife misery or pain. So, too, was the question of injury to health.

There is a presumption that the husband intended the natural consequences of his conduct towards his wife, and nowhere in his evidence does he deny such an intention, or suggest that he did not know that his conduct was likely to cause her pain. His attitude was one of animosity without expression of regret, and the justices were entitled to take the view that he must be presumed to have intended to injure his wife's health. [He referred to *Lauder v. Lauder* (28); *Squire v. Squire* (29).] This case does not present the same difficulties as *Boyd v. Boyd* (30), because the husband's conduct was unquestionably "aimed at" his wife.

Although there was no physical violence, the nature of the conduct here alleged to be cruelty was such that it might cause much more pain and misery than an occasional blow. It was continuous, and took place over a long period. It is submitted that it amounted to a course of conduct which was calculated to break the wife's spirit and morale. [He referred to *Kelly v. Kelly* (31); *Bethune v. Bethune* (32) and *Walmesley v. Walmesley* (33) in support of this contention.]

Cur. adv. vult.

March 19. The following judgments were read:—

LORD MERRIMAN, P. The justices made an order in the wife's favour, about the amount of which there is no dispute. They did not make a separation order. The children of the marriage are all

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(25) [1949] P. 277.

(26) [1949] P. 51.

(27) Ante, 38.

(28) [1949] P. 277.

(29) [1949] P. 51.

(30) [1938] W. N. 336; 55 T. L. R.

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(31) (1869) L. R. 2 P. & M. 31.

(32) [1891] P. 205.

(33) (1893) 69 L. T. 152.

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of age, so that no question of custody arose. The sole issue in this appeal, therefore, is whether the finding of persistent cruelty was justified. The case has been fully and clearly argued on both sides, and our attention has been called to a considerable number of recent authorities on the subject.

The case is one that has caused me some difficulty, because it seems to be increasingly difficult to obtain consistent guidance from decisions of the Court of Appeal on two distinct matters each of which is of vital importance in the determination of this appeal. I say this with all deference and diffidence: with deference because this court desires, as always, to pay due respect to any decision of the Court of Appeal; with diffidence because, as will appear, I must admit that, sitting as I have sometimes done in the Court of Appeal, decisions to which I have been a party have apparently contributed to the confusion which exists.

The first of these matters, which directly concerns the merits of this case, involves the question how far in connexion with cruelty and the kindred offence of desertion of what is commonly called the "constructive" kind, phrases used aptly enough, no doubt, in a particular context, such as that the conduct complained of must be "aimed at" the aggrieved spouse and not merely be "the development and manifestation of the" offending spouse's "character acting so to speak in its own sphere" are to be regarded as expressing a doctrine of universal application; *Horton v. Horton* (34); *Westall v. Westall* (35); and *Kaslefsky v. Kaslefsky* (36); and in relation thereto the application of the maxim that a person is to be taken to intend the natural consequences of his own conduct.

The second is the more general question as to the point at which, in relation to the well-known limits laid down by the House of Lords in "*Hontestroom*" v. "*Sagaporack*"; "*Hontestroom*" v. "*Durham Castle*" (37), and in *Watt (or Thomas) v. Thomas* (38), on the right of an appellate tribunal to differ from the trial court, the line is properly to be drawn between interference with findings of fact and holding that there has been a misdirection because those facts do not, in law, constitute the offence charged.

As to the first question, I am fortified in the opinion that some confusion is in danger of arising by a judgment of Evershed, M.R., in *Allen v. Allen* (39), with which Jenkins and

(34) [1940] P. 187.

(35) 65 T. L. R. 337.

(36) Ante, 38.

(37) [1927] A. C. 37.

(38) [1947] A. C. 484.

(39) Feb. 1, 1951, C. A. (unreported).

Hodson, L.JJ., concurred. The case is not yet reported, but we have been provided with a transcript of the relevant parts of the judgment. That appeal was from the refusal of the special commissioner at Bristol to pronounce a decree on the petition of a wife based on alleged cruelty. At the beginning of his judgment Evershed, M.R., said: "The material language of the section has, I think, always in these matters to be borne in mind, for if a court is prone too much to indulge in exposition and attempted definition, there is a risk that there will be substituted for the language chosen by Parliament some other form of words. In such a case as this the duty of the court to pronounce a decree of divorce is 'if the court is satisfied on the evidence' that the respondent has, since the celebration of the marriage, treated the petitioner with cruelty. As I ventured to point out in *Squire v. Squire* (40) those are English words in ordinary usage, and it means that the alleged cruelty must be something which satisfies that language according to its ordinary acceptation".

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Conversely, I would add that there is also a danger of undue restriction. This is expressed in a passage in the speech of Lord Atkin in *Donoghue v. Stevenson* (41) as follows: "I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted". This seems to me peculiarly applicable to the matrimonial offences of cruelty and desertion. Neither is defined by statute. The whole law relating to each is judge-made.

Returning to *Allen v. Allen* (42), later in his judgment Evershed, M.R., added: "I am bound to say that the impression I have formed reading the evidence, and without quarrelling in the least degree with anything that the judge has said, is that unhappily these two persons became temperamentally estranged and that the judge is therefore right when he says that what the wife suffered she suffered because she and her husband really proved to be incompatible, neither interested in the other; and each therefore presumably sat round in silence

(40) [1948] P. 51, 61.

(41) [1932] A. C. 562, 583.

(42) Feb. 1, 1951, C. A. (unreported).

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“ without conversation with the other, and that state of affairs unhappily played seriously upon the wife’s mind. If that is right, it seems to me that that would be stretching cases of cruelty to the lengths which they have never reached yet, and which it seems to me they should not reach now. Indeed, if they did, it seems to me that one would be substituting as a ground for divorce something quite different from that which is relied on here, namely, the allegation that the respondent has treated the petitioner with cruelty ”.

Then, after expressing approval of the decision of the Court of Appeal in *Lauder v. Lauder* (43) and calling attention to the marked difference between the facts in that case and the facts of the case then under consideration, and quoting with approval from the head-note in *Horton v. Horton* (44), a citation from the judgment of Bucknill, J., Evershed, M.R., continued: “ It has so often been said that it is obvious, yet it is worth repeating, that all cases that come before this court must be determined upon their own particular facts, and I should imagine that in no class of case is that trite observation truer than in matrimonial cases. The circumstances vary infinitely from case to case. The fact is, I think, another reason for a sense of danger in trying to formulate principles of law out of particular circumstances in particular cases, and then treating those principles of law as being, so to speak, explanations or riders to the actual statutory language ”.

I have quoted those observations because in this case the argument on behalf of the husband can be, and indeed was, shortly summarized by the submission that the justices had made an unwarranted extension of the principles laid down in *Lauder v. Lauder* (45). In substance the passage which I have already quoted could be used almost literally to describe the submission on behalf of the husband in this case. With the general observations of the Master of the Rolls I desire most respectfully to express my complete agreement. With these general observations I would also couple the passage at the end of Denning, L.J.’s judgment in *Kaslefsky v. Kaslefsky*, where he said (46): “ If the door of cruelty were opened too wide we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled ”.

(43) [1949] P. 277.

(45) [1949] P. 277.

(44) [1940] P. 187.

(46) Ante, 38, 48.

On behalf of the wife it is said that this is a case of a course of conduct calculated to break her spirit within the meaning of the line of cases beginning, to go back no farther, with *Kelly v. Kelly* (47), in which the well-known passage in Lord Penzance's judgment (48) was expressly approved by the full court (49), and continuing with *Mytton v. Mytton* (50); *Bethune v. Bethune* (51) and *Lauder v. Lauder* (52), thereby endangering her mental health, or at least causing reasonable apprehension of such danger.

On behalf of the husband it is contended that this is really a case in which both spouses have lost all affection for each other and have become completely indifferent, and that the husband's alleged misconduct amounts to no more than the "development" and manifestation of his character acting so to speak in its own "sphere", and that it is no more "aimed at" the wife than her corresponding attitude is "aimed at" him.

As to the wife's case, let me say first of all that if she establishes misconduct on the part of the husband no question arises about the element of persistence essential to a charge of cruelty in a court of summary jurisdiction. That is implied in the allegation that it is a course of misconduct. Likewise, it is admitted that there is sufficient evidence, provided the necessary misconduct is established, that there is at least apprehended injury to the wife's health. Indeed, the allegation that the husband was callously indifferent to the signs of injury to his wife's mental health was one of the factors put forward as constituting misconduct.

[His Lordship then stated, in the terms above set out, the nature of the case as put forward by the wife and husband, and continued:] I have already dealt with reason No. 4 [concerning the wife's health] and have summarized the evidence in support of reasons Nos. 1 and 2 [concerning the acceptance of the wife's evidence and the wilful nature of the husband's conduct]. Reason No. 3 is in effect a direction to themselves by the justices in point of law. But the note does not show, nor were counsel able to inform us, what were the authorities by which the justices guided their decision.

Before us the judgment of Denning, L.J., in *Hosegood v. Hosegood* (53) was relied upon. The case itself appears to have

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(47) L. R. 2 P. & M. 31.

(48) Ibid. 32.

(49) Ibid. 60.

(50) (1886) 11 P. D. 141.

(51) [1891] P. 205.

(52) [1949] P. 277.

(53) 66 (Pt. 1) T. L. R. 735.

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been a simple one. The other two members of the court appear to have disposed of the appeal on the facts; but these are not set out in the report. Denning, L.J., however, in his judgment went much further; and as this judgment is constantly being cited as if it were the judgment of the court I feel compelled to point out that in some respects it conflicts with authority by which I think the Lord Justice was bound. I say nothing about the conclusion expressed in the first paragraph (54) that two spouses in respect of the same parting may each be guilty of desertion at the same time. It may possibly be thought that a judgment which leads to this conclusion is not the most authoritative exposition of this branch of the law. I know of no other authority for this proposition, but it is one which must be dealt with when it is directly in issue in a concrete case. For the moment I am concerned with the development of the theory (55) that there are two rival schools of thought about constructive desertion. This is based on the supposed misunderstanding of the time-honoured maxim, used in many contexts other than the law relating to cruelty and desertion, that a man must be taken to intend the natural consequences of his own conduct.

The leading expositions of these two "schools of thought" are said to be found in *Boyd v. Boyd* (56), a decision of Bucknill, J., and *Edwards v. Edwards* (57), a decision of this court in which the judgment in *Boyd v. Boyd* (56) was expressly disapproved. Before going further I would point out that *Boyd v. Boyd* (56) has had a somewhat chequered career. It was a case in which the judge declined to find constructive desertion against a husband who had been guilty of an indecent assault on a girl under thirteen years of age, although his wife had previously forgiven him after he had served a sentence for incestuous adultery. The ground for the decision was that there was no evidence of an intention on the part of the husband to bring the cohabitation to an end. At the same time the judge indicated that the husband might have been guilty of cruelty, and therefore did not dismiss the petition, but allowed it to be amended to include a charge of cruelty. As a matter of history, as appears from a footnote to *Edwards v. Edwards* (58), he himself pronounced a decree of divorce on the ground of cruelty on the same facts.

As I have ventured to say on more than one occasion, the

(54) 66 (Pt. 1) T. L. R. 735, 740.

(55) *Ibid.* 738-739.

(56) [1938] W. N. 336; 55 T. L. R. 3.

(57) [1948] P. 268.

(58) [1948] P. 268, 271.

principles governing constructive desertion are, in my opinion, nowhere more accurately or more succinctly stated than by Asquith, L.J., in *Buchler v. Buchler* (59), where, at the beginning of his judgment, he said (60): "In the first place it is common ground—and a commonplace—that the spouse who leaves the matrimonial roof is not necessarily the deserter. Constructively, the deserter may be the party who remains behind, if that party has been guilty of conduct which justifies the other party in leaving. Secondly, to afford such justification the conduct of the party staying on need not have amounted to a matrimonial offence, such as cruelty or adultery. But thirdly, it must exceed in gravity such behaviour, vexatious and trying though it may be, as every spouse bargains to endure when accepting the other 'for better, for worse'. The ordinary wear and tear of conjugal life does not in itself suffice". In other words, as between cruelty and constructive desertion, the latter may in certain circumstances be the lesser offence of the two, but both involve conjugal ill-treatment of a serious kind.

The point of the judgment of this court in *Edwards v. Edwards* (61) was that we were unable to accept the proposition that conduct which might be held to be cruelty, and indeed was subsequently so held, would not satisfy the test necessary to constitute constructive desertion because the husband was said in his own mind not to wish to break up the marriage. In passing I may say that in deciding *Edwards v. Edwards* (61) both members of this court were well aware of the reference to *Boyd v. Boyd* (62) in Lord Greene, M.R.'s judgment in *Buchler v. Buchler*, where he adopted the phrase (63) from the judgment of Bucknill, J., that the spouse charged with desertion must be shown to have been guilty of conduct equivalent to "driving the other spouse away". This, however, does not necessarily imply approval of the actual decision on the facts.

In *Hosegood v. Hosegood* (64) Denning, L.J., expressed the opinion that the reasoning in *Boyd v. Boyd* (62) was unanswerable and that *Edwards v. Edwards* (61) was wrong. I am still unrepentantly of the opinion that *Boyd v. Boyd* (62) was wrongly decided on the facts, and that *Edwards v. Edwards* (61) was right in so holding. But it would no doubt be an impertinence for me to say so if there were not authority of the Court of Appeal for that proposition. *Edwards v. Edwards* (61) was expressly approved

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(59) [1947] P. 25.

(60) Ibid. 45.

(61) [1948] P. 268.

(62) [1938] W. N. 336; 55 T. L. R. 3.

(63) [1947] P. 25, 29.

(64) 66 (Pt. 1) T. L. R. 735, 739.

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in *Squire v. Squire* (65). Also in *Everitt v. Everitt* (66) the Court of Appeal, consisting of Bucknill and Cohen, L.JJ., and myself, expressly approved the decision. This fact was ignored by Denning, L.J., in *Hosegood v. Hosegood* (64). But in this court at any rate I consider myself bound by these decisions, and not the less so because in the latter case the judge who decided *Boyd v. Boyd* (67) as a judge of first instance was party to our judgment as a member of the Court of Appeal.

I take leave to doubt, however, whether there really are two schools of thought about the application of the doctrine that a man must be taken to intend the natural consequences of his own conduct. I prefer to think that in referring as he did in the passage in his judgment in *Buchler v. Buchler* (68), to which Denning, L.J., alluded, both to *Boyd v. Boyd* (69) and *Sickert v. Sickert* (70), Lord Greene, M.R., was not really vacillating between two rival schools of thought but that he said what he did because he did not think that any such rivalry existed. After all, the conception embodied in the maxim has been applied, as I have already said, to a variety of subjects, and I doubt whether any court has regarded it as an irrebuttable presumption of law.

For example, *Derry v. Peek* (71) settled the law that to establish deceit it is not sufficient to prove that there is no reasonable ground for a belief, in fact held, in the truth of the representation complained of, but that it must be proved that the defendant made the representation knowing it to be false, or not believing it to be true, or (as a branch of the latter) recklessly, not caring whether it was true or false. And although the fact that no reasonable person could hold such a belief affords evidence of fraudulent intent, nevertheless if it appears that the belief is truly held the defendant is not guilty of deceit. In other words, although the natural consequences of making the representation may be to lead to the presumption that it was fraudulent, the presumption is not irrebuttable even if the belief is as absurd, to take an extreme example, as that of the genuine "Geoplaniarians" in Kipling's story. Likewise in what Farwell, L.J., in *Jones v. Hulton* (72) regarded as the kindred case of defamation, the defendant is taken to have "intended the natural meaning of

(65) [1949] P. 51, 57.

(66) [1949] P. 374, 385.

(67) [1938] W. N. 336; 55 T. L. R. 3.

(68) [1947] P. 25.

(69) [1938] W. N. 336; 55 T. L. R.

(64) 66 (Pt. 1) T. L. R. 735, 739.

3: see [1947] P. 25, 29.

(70) [1899] P. 278: see [1947] P. 25, 30.

(71) (1889) 14 App. Cas. 337.

(72) [1909] 2 K. B. 444.

"his own words" (73). If it is a natural consequence of the words used that the reader thinks that a particular A. B. was intended—whether that word is used in the literal sense of "pointed at" or the modern sense of "meant"—the writer's assertion that he had never heard of A. B. is irrelevant; but it may be otherwise if he proves that he wrote the words of and concerning another actual A. B.

Without going through the careful examination of the doctrine in *Squire v. Squire* (74), with which I respectfully agree, I venture to suggest that in this jurisdiction at any rate we may continue to use the time-honoured maxim, provided always that we remember that it does not express an irrebuttable presumption of law and that it is only to be applied in connexion with conduct which can fairly be described as ill-treatment. That, I think, is what Lord Greene, M.R., meant by saying, in *Buchler v. Buchler* (75), that if the facts relied on are not "such as to justify her in treating them as a dismissal from the consortium . . . she could not convert them into such a justification by announcing her intention of leaving her husband if he did not change his conduct". Again, in the same paragraph, he says: "This is not, in my opinion, affected by the doctrine that a person must be taken to intend the probable consequences of his acts; for if the acts are not such as to justify the wife in treating herself as expelled from the matrimonial home no inference can be drawn from those acts of an intention to expel her".

The fundamental objection to the decision in *Boyd v. Boyd* (76) seems to me to be that the inevitable conclusion from the finding that there was no constructive desertion because the husband wished to continue the marriage is that, in refusing to live with a husband who had been guilty for the second time of a sexual offence directly relevant to his conjugal obligations, the wife herself would be guilty of desertion if he offered to resume cohabitation. I use the words "directly relevant to his conjugal obligations" in order to guard against being supposed to suggest that the mere fact that a husband has been convicted of some crime unconnected with his obligations as a husband, injurious as that might be to the wife, would support a charge of cruelty or of constructive desertion.

But, as Lord Greene, M.R.'s reference to *Boyd v. Boyd* (76) in *Buchler v. Buchler* (77) has been cited in support of the proposition that the husband's conduct must be "aimed at"

(73) Ibid. 480-3.

(74) [1949] P. 51.

(75) [1947] P. 25, 44-5.

(76) [1938] W. N. 336; 55 T. L. R. 3.

(77) [1947] P. 25, 29.

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the wife, I point out that both Lord Greene, M.R. (78), and Asquith, L.J. (79), made it clear that, if it had been shown that there was anything of a homosexual nature in the relations between the husband and the man in question, the appeal would have been otherwise decided. But that suggestion had been expressly disclaimed. I would observe, however, that had the case been decided otherwise for that reason, such conduct would be neither more nor less "aimed at" the wife than was the conduct of the husband in *Boyd v. Boyd* (76) and would be neither more nor less a manifestation of his own character. That in such a case a wife who refused to resume cohabitation would be liable to be held to be the deserter is the inevitable result of Warrington, L.J.'s judgment in *Thomas v. Thomas* (80). The analysis of that judgment in yet another *Thomas v. Thomas* (81) was also referred to with approval in the judgment in *Everitt v. Everitt* (82) in a passage immediately preceding the approval of *Edwards v. Edwards* (83). I understand, also, that the reasoning in this later case of *Thomas v. Thomas* (81) was approved by the Court of Appeal in a case of which I have not been able to find a report. I know that Somervell, L.J., was sitting, but whether or not he was presiding I am not sure.

In *Thomas v. Thomas* (84), Warrington, L.J., was laying down the principle, founded on *Russell v. Russell* (85), and consistently followed in numberless cases, that the mere fact that an ill-treated wife refuses the husband's overtures for a resumption of cohabitation does not necessarily end a state of desertion if her refusal is reasonable in the circumstances, for if it did so the very fact of her refusal to resume cohabitation would change her from the deserted to the deserting spouse, which, as Warrington, L.J., said, would be absurd. In such a case it is the husband's misconduct, not his avowed intention, which is the determining factor: see *Buchler v. Buchler* (86). Likewise, with regard to *Boyd v. Boyd* (87), to hold that the wife is entitled to divorce on the ground of cruelty while on the same facts she would be liable to be held guilty of desertion, seems to me to be equally absurd. However that may be, the decision in *Boyd v. Boyd* (87) seems to afford a very insecure foundation for the line of thought of which it is said to be the best illustration.

(78) *Ibid.* 42-3.(79) *Ibid.* 47.

(80) [1924] P. 194, 201.

(81) (1945) 62 T. L. R. 166, 168.

(82) [1949] P. 374, 385.

(83) [1948] P. 268.

(84) [1924] P. 194.

(85) [1895] P. 315; [1897] A. C.

395.

(86) [1947] P. 25, 45.

(87) [1938] W. N. 336; 55 T. L. R.

3.

If the husband's conduct in the present case is held to be of sufficient gravity, I feel no doubt that, although it may be said that it was a manifestation of his own character or temperament, it should be held to be "aimed at" the wife, and that he should be taken to have intended the apprehended danger to her mental health.

That brings me to the second matter. In the course of the argument our attention was called to two decisions in the Court of Appeal, *Clark v. Clark* (88) and *Pew v. Pew* (89). In both these cases this court had overruled a decision of justices in favour of a wife on the ground of constructive desertion. In both cases the Court of Appeal reversed the decision of this court on the ground that its decision infringed the principle laid down in *Watt (or Thomas) v. Thomas* (90), about the limitation of the right of an appellate court to overrule the findings of the court which had the advantage of seeing and hearing the witnesses. As I was not concerned in the decision of *Clark v. Clark* (88) I know nothing beyond what appears in the short report in the Weekly Notes. I was, however, party to the decision of this court in *Pew v. Pew* (89), and, as that case seems to me to have a direct bearing upon the decision of the present case, I must refer to it.

Let me say at once that I do not question the correctness of the decision of the Court of Appeal. It was a borderline case. This court took the view that it was on the wrong side of the line, but we gave leave to appeal after the Court of Appeal itself had referred back to us the question whether leave to appeal should be granted, because we thought that the Court of Appeal might very well take the view that from the wife's point of view it was on the right side of the line. But what I confess that I do not understand in relation to that case is how *Watt (or Thomas) v. Thomas* (90) bore upon the decision one way or another. Somervell, L.J., was, of course, perfectly correct in saying, as he did, that the principles laid down in that case were perfectly familiar to this court. Perhaps I may be allowed to mention one circumstance in support of this. Only a few months earlier an attempt had been made in Parliament to insert into the Married Women (Maintenance) Bill a clause transferring to quarter sessions the appellate jurisdiction of this court in relation to the Summary Jurisdiction (Married Women) Code, for the

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(88) [1950] W. N. 489.

(90) [1947] A. C. 484.

(89) Jan. 30, 1951, C. A. (unreported).

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express reason that this court habitually acted, as it is obliged to do, on the principles laid down in *Watt (or Thomas) v. Thomas* (91). But the statement of the principle in that case expressly excludes a case in which the trial court has misdirected itself. In such cases the principles laid down by the House of Lords have no bearing, otherwise the appellate court would always be bound by the conclusion, however clear it might be that in law the evidence, taken at its highest, did not warrant it.

Wrongly, as I recognize unreservedly, that was the conclusion to which this court came in *Pew v. Pew* (92). I have refreshed my memory from my own note and the transcript of my judgment. We asked counsel for the wife, who was not the counsel who appeared for her in the Court of Appeal, to tell us in detail the very highest at which he put the evidence on which he relied. I made a note of that analysis, and for the purposes of my judgment I stated expressly that, without going through the evidence in detail, I took the very fair summary of it which was made for us from the wife's point of view by her counsel. I can only speak for myself, but I can say definitely that my intention was to accept loyally every finding which the justices had made in her favour. But, giving full effect to that evidence, I came to the conclusion, as a matter of law, that the case was on the wrong side of any line which could properly be drawn. In so doing I attempted to guide my judgment by the decision in *Buchler v. Buchler* (93), not, as I said, because I thought that one could derive much assistance from comparing the facts of one case with the facts of another, but because that case, like the one we were considering, was a borderline case, and was so considered by Lord Greene, M.R. (94); and because it was with reference to such a case that general observations of a very helpful character were made both by Lord Greene and by Asquith, L.J.

In the Court of Appeal in *Pew v. Pew* (92), Somervell, L.J., after referring to *Watt (or Thomas) v. Thomas* (95) and analysing the evidence in the case, said: "I am not sure that one can find "any such evidence of misdirection having regard to the principles laid down in *Buchler v. Buchler* (96), to justify the "court in interfering", and again, after quoting my own conclusion that "this case falls short of crossing the borderline

(91) [1947] A. C. 484.

(92) Jan. 30, 1951, C. A. (unreported).

(93) [1947] P. 25.

(94) Ibid. 35.

(95) [1947] A. C. 484.

(96) [1947] P. 25.

“ which divides blameworthy conduct, causing unhappiness to
 “ the other spouse, from conduct equivalent to expulsion from
 “ the matrimonial home ” the Lord Justice added: “ This is no
 “ doubt a borderline case as to whether an appellate court should
 “ intervene ”.

In the last paragraph of his judgment, however, he states his own conclusion that there was evidence on which the justices could find that there was constructive desertion as laid down in *Buchler v. Buchler* (96). In spite of the doubts that the Lord Justice had already expressed, this is in effect a definite decision that there had been no misdirection. Denning, L.J., recognized that this court had accepted the findings of fact about the husband's conduct but had held that this was not capable in law of being constructive desertion; that is to say, that we had held that the justices had misdirected themselves. He took the contrary view, even more definitely than Somervell, L.J., had done.

Singleton, L.J., emphasized the fact that the legislature had entrusted the justices with the jurisdiction to hear this type of case; that there was a long and careful hearing; that both sides were represented and that this court had described the case as being a borderline case. So far exactly the same was true of *Buchler v. Buchler* (96), yet the Court of Appeal held, reversing the trial judge, that the case was on the wrong side of the line.

The Lord Justice continued: “ If they come to a decision
 “ which is justified by the evidence no court ought to interfere,
 “ or at least no court ought to interfere unless it is shown that
 “ that decision is plainly wrong. I believe it to be of great
 “ importance in the administration of justice and particularly in
 “ this class of case, that the decision should be left to the
 “ magistrates to whom the statute has entrusted it, and that
 “ their decision should not be interfered with if they have directed
 “ themselves properly according to law and if their decision is
 “ based on the evidence before them ”.

With the greatest possible respect, it seems to me that this begs the question whether the magistrates had directed themselves properly and whether there was or was not evidence on which to base their decision, and ignores the essential distinction between an appellate court finding that the evidence ought not to have been accepted by the tribunal which saw and heard the witnesses, and an appellate court accepting the totality of the facts found by the trial court, but holding nevertheless that in law those facts do not suffice to constitute the offence charged.

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This distinction is plainly drawn in propositions (1.) and (3.) in Lord Thankerton's speech in *Watt (or Thomas) v. Thomas* (97).

The same question arose in "*Hontestroom*" v. "*Saga-porack*"; "*Hontestroom*" v. "*Durham Castle*" (98), already referred to. In his speech Lord Sumner said (99): "I therefore think, for my own part, that the real issue in this case is whether the Court of Appeal was justified in laying aside the learned President's view as to the relative credibility of the witnesses and the conclusions of fact which he rested thereon, and in reviewing afresh the whole of the evidence, so as to form their own opinion without regard to his appreciations". It is this process, I venture to say, which is deprecated both in "*The Hontestroom*" (98) and in *Watt (or Thomas) v. Thomas* (100), but it makes the task of the appellate court very difficult if it is precluded from expressing an opinion about the conclusion, taking the evidence at its most favourable for the complainant. However that may be, once the majority of the Court of Appeal in *Pew v. Pew* (101) had held that there was no misdirection, there was an end of the matter, and that, I suggest, was the true ground of the decision.

I have discussed that case because it seems to me to have a direct bearing on our decision in this case. The two cases bear a strong resemblance to each other. I must say that, in so far as they are comparable, I think that the facts in this case, taken at their highest and bearing in mind that this is a charge of cruelty, are less favourable to the wife than the facts in *Pew v. Pew* (101). There is, of course, this distinction, that if this case had been one of constructive desertion, the evidence that the husband had actually told the wife to go as lately as a few weeks before the hearing, might have been decisive of that issue. Even on a charge of persistent cruelty it has an important bearing on the husband's intentions. For the rest it is clear, for the wife said so repeatedly, that one of the fundamental troubles was the husband's alleged meanness about money; but, after all, his salary was only 560*l.* a year, out of which he paid all the household expenses and allowed the wife 3*l.* a week. Out of this sum, since the son paid 1*l.* for his board, the wife had only to provide food for herself and for such meals as the husband took in the home and did not buy for himself, which, in effect, seem to have been his daily breakfast and his other meals during the week-end.

(97) [1947] A. C. 484, 487-8.

(98) [1927] A. C. 37.

(99) *Ibid.* 42.

(100) [1947] A. C. 484.

(101) Jan. 30, 1951, C. A. (unreported).

It is true that he had another house which brought in a small controlled rent out of which it was suggested there cannot have been much profit, if any, and the only other income that he had was the allowance given by the municipal authority for the use of his car in connexion with his duty as health officer. No doubt the housekeeping allowance was not lavish, but it is not without significance that it is the precise amount which the justices have awarded by their order, although they had jurisdiction to award 2*l.* more. I am bound to say that, if I felt it was open to do so, I should be inclined to hold that this case was covered by the principles laid down in *Buchler v. Buchler* (102), but I feel that if we were to do so we might be thought to be setting up the judgment of this court in *Pew v. Pew* (101) against that of the Court of Appeal. I feel bound by that decision to say that this appeal fails; but I think that there should be leave to appeal and I am impelled to say that I hope that some day, whether in this case or another, a full Court of Appeal will consider anew the whole question of cruelty and constructive desertion.

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KARMINSKI, J. I have had the advantage of reading the judgment of my Lord, and it is therefore unnecessary for me to recapitulate the evidence, since I agree with his summary of it.

The justices made a finding of law which they stated in the following terms:—"The court is satisfied after considering the "authorities that the acts of the husband as outlined by the wife "constitute cruelty". It is unfortunate that the justices did not set out what authorities they had consulted; since there is the possibility that the justices may have considered irrelevant authorities, and in so doing may have misdirected themselves on the law: see *Angel v. Angel* (103). I am therefore left to infer what authorities they did, in fact, consider. It is of some assistance to note that in the second of their reasons they refer to the husband's conduct as being wilful and his acts as being intentional; these epithets indicate to my mind that the justices directed their minds to some, at any rate, of the more recent decisions on the subject of cruelty.

It was argued by Mr. Ormrod for the husband that even accepting all the facts as found by the justices, such conduct could not amount in law to cruelty. Mr. Ormrod argued that to make a finding of cruelty on the facts before the justices would

(101) Jan. 30, 1951, C. A. (un-reported).

(102) [1947] P. 25.

(103) (1946) 62 T. L. R. 755, 756.

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be to go further than any case hitherto reported had done, and that the finding of cruelty was wrong in law in the light of existing authority. It has for very long been settled law that married persons shall not be legally separated upon the mere disinclination of one or both to cohabit together, nor do the courts pretend to furnish cures for all the miseries of human life: see *Evans v. Evans* (104) and also the judgment of the Master of the Rolls in *Allen v. Allen* (105) cited by my Lord. In *Evans v. Evans* (106), Sir William Scott said: "What merely wounds the mental feelings is in few cases to be admitted, where they are not accompanied with bodily injury either actual or menaced". That cruelty can exist in the absence of acts of physical violence has long since been established: see *Kelly v. Kelly* (107) and *Walmsley v. Walmsley* (108); provided that either injury to health or a reasonable apprehension thereof can be proved. A moody husband who sends his wife to Coventry, as in *Lauder v. Lauder* (109), or a wife who persists over a long period in nagging at her husband, as in *Usmar v. Usmar* (110), can be guilty of cruelty. But conduct which causes injury to health is not by itself enough. The test was stated by Bucknill, J., in *Horton v. Horton* (111), in the following terms: "A man takes the woman for his wife for better, for worse. If he marries a wife whose character develops in such a way as to make it impossible for him to live happily with her, I do not think he establishes cruelty merely because he finds life with her is impossible. He must prove that she has committed wilful and unjustifiable acts inflicting pain and misery upon him and causing him injury to health. In this case, the husband's health was not injured merely by the development and manifestation of the wife's character acting so to speak in its own sphere. It was injured by her wilful and unjustifiable conduct to him which was an intrusion upon and did violence to his own mode of living. This course of conduct injured his health, and in my view amounted to legal cruelty".

By s. 1 of the Matrimonial Causes Act, 1950, a petition for divorce may be presented to the court on the ground that the respondent "has since the celebration of the marriage treated the petitioner with cruelty". In *Kaslefsky v. Kaslefsky* (112)

(104) 1 Hagg. Con. 35, 36.

(105) Feb. 1, 1951, C. A. (unreported).

(106) 1 Hagg. Con. 35, 38.

(107) L. R. 2 P. & M. 31 and 59 (C. A.).

(108) (1893) 69 L. T. 152.

(109) [1949] P. 277.

(110) [1949] P. 1.

(111) [1940] P. 187, 193.

(112) Ante 38, 45.

it was pointed out by Bucknill, L.J., that the use of the word "treated" indicates conduct aimed at the offended spouse, and he agreed with the judgment of Denning, L.J., in *Westall v. Westall*, where that Lord Justice said that (113): "Although malignity is not an essential element of cruelty . . . , nevertheless intention is an element in this sense, that there must be conduct which is, in some way, aimed by one person at the other". In his own judgment in *Kaslefsky v. Kaslefsky* (114) Denning, L.J., explained the meaning of the words "aimed at". He pointed out that the conduct of one party can properly be said to be aimed at the other when it consists of actions or words actually or physically directed at him, and that it might be cruelty even though there was no desire to injure or to inflict misery on the other spouse. It is, I think, important in considering the judgment of the Court of Appeal in *Kaslefsky v. Kaslefsky* (114) to examine the nature of the complaints there made against the respondent wife. These complaints alleged cruelty based on conduct which was almost wholly negative, and which alleged that the wife was a lazy and sluttish woman who neglected her duties both as a wife and as a mother. But it was held by the divorce commissioner who tried the case, and his finding was upheld by the Court of Appeal, that such acts were not intentional acts or aimed specifically at the husband, and could not, therefore, amount in law to cruelty.

I am content to follow the words of the statute, namely, "has treated the petitioner with cruelty", as being the true test when examined and applied in the light of the guidance afforded by the decisions of the Court of Appeal referred to above. In cruelty cases in particular, once the guiding principle is established, its application depends upon a careful examination of the facts of each particular case. Once the facts are established the question is whether this particular class of conduct by this man to this woman in all the circumstances of their married life is cruelty: see *per* Pearce, J., in *Lauder v. Lauder* (115).

Accepting the facts as found by the justices, in my view the conduct of the husband here was wilful, intentional and aimed at his wife. Although I think that this is a borderline case, I am not prepared to differ from the conclusion that he entered into a course of conduct which was calculated to break the wife's spirit and if possible to induce her to leave the matrimonial home. In so acting, the husband's conduct caused injury to the wife's

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(113) 65 T. L. R. 337.

(114) Ante 38, 46

(115) [1949] P. 277, 308.

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health, coupled with the threat of graver injury if she remained living with him. I cannot therefore regard the husband's conduct in this case as being part of the ordinary wear and tear of married life. After full consideration I do not think that the husband's conduct can be limited, as was suggested in argument, to what Sir William Scott called in *Evans v. Evans* (116) "a want of "civil attention and accommodation".

For these reasons I think that this appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rising & Ravenscroft, agents for Sherwood, Cobbing & Williams, Kingston-on-Thames; C. A. Maddin & Co., Surbiton.*

J. B. G.

(116) 1 Hagg. Con. 35.

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Husband and wife—Divorce—Validity of Mahomedan divorce in Egypt—English wife of Egyptian—Parties married in England at register office—Decree on ground of desertion.

A Mahomedan domiciled in Egypt purported to dissolve his marriage to an Englishwoman, which had been celebrated at a register office in this country, by means of a declaration at the Cairo Court of Personal Status of which the wife was given no notice. That divorce was in accordance with Mahomedan law and was recognized as a valid divorce in Egypt.

On a subsequent petition by the wife, who had remained resident in this country, for a divorce on the ground of desertion:—

Held, that the marriage was a marriage in the Christian sense, and could not be dissolved by a method of divorce which was appropriate to a polygamous union; and that, as it had accordingly remained a valid and subsisting marriage, the Mahomedan divorce being inappropriate to such a union, and since the wife had been deserted by her husband, she was entitled to a divorce.

Rex v. Hammersmith Superintendent Registrar of Marriages [1917] 1 K. B. 634 applied.

Shaw v. Attorney-General (1870) L. R. 2 P. & M. 156, and *Rudd v. Rudd* [1924] P. 72 distinguished.

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The parties were married on March 4, 1946, at a register office at Cambridge. The wife at that time was twenty-two years of age, a spinster, a Christian, and domiciled in England; the husband was twenty-one years of age, a bachelor, a Mahomedan, and domiciled in Egypt. The husband was, at the time of the marriage, an undergraduate of Cambridge University, and it was agreed between them that when he had graduated both he and his wife were to leave England for Egypt and make their permanent home there. In the meantime they lived together in Cambridge. There was no issue of the marriage. In June, 1946, the husband graduated, and their luggage was sent to a travel agency in London for transhipment to Egypt. On June 16, 1946, the husband went alone to London, ostensibly on a visit to his mother, and from that day to the date of the hearing the wife, who remained in this country, never saw him. She wrote to him several letters at his father's address in Cairo, but received no replies. In August, 1946, at the invitation of the Egyptian embassy, she called there and was informed that her husband had divorced her on June 29, 1946, and she was given a copy of the divorce certificate. For a time she believed this divorce to be valid, and in consequence of that belief she signed a document on June 21, 1947, at the Egyptian consulate accepting a sum of 125*l.* in full and final settlement of any claim which she might have had against her husband.

In December, 1950, she presented a petition for divorce on the ground of desertion.

Neville Vincent for the wife. The wife had no notice or knowledge of the proceedings. In such circumstances the Egyptian decree was invalid as being contrary to natural justice: see *Rudd v. Rudd* (1); *Shaw v. Attorney-General* (2).

A marriage in England cannot be dissolved according to the law of England by the mere operation of the laws of the husband's religion without a decree of a court of law; but even if this marriage were held to have been dissolved by a court of competent jurisdiction, the decree was unilateral, and should not be recognized.

[He referred to *Rex v. Hammersmith Superintendent Registrar of Marriages* (3).]

(1) [1924] P. 72, 76-8.

(3) [1917] 1 K. B. 634.

(2) (1870) L. R. 2 P. & M. 156.

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The husband did not appear and was not represented.

Cur. adv. vult.

May 8. BARNARD, J., read the following judgment, in which he stated the facts, and continued:—The question which I have to decide is whether the divorce which the respondent effected on June 29, 1946, at Cairo in Egypt is a divorce which would be recognized as valid by the courts of this country. The document, which was produced, is not a decree of any court, resulting from any divorce proceedings. It would appear to be a certificate to the effect that the husband together with two witnesses appeared at the Cairo Court of Personal Status and that there the husband declared that he had divorced his legally married wife by saying "My wife Kathleen Mary Collet [the wife's maiden name] is "divorced from me by three divorces", and that the divorce took place in the presence of the same two witnesses. The document seems to be nothing more nor less than the registration of a divorce. I have heard the evidence of Mr. Nasir and I am satisfied on his testimony that this divorce is in accordance with the Mahomedan religion and would be recognized as a valid divorce in Egypt.

It is the established rule of English law that domicile is the true test of divorce jurisdiction, and the courts of England will recognize as valid any divorce which is granted by the courts of the country where the parties are domiciled, even on a ground which is not a ground for a divorce in England. The wife acquired by her marriage an Egyptian domicile. Counsel has argued that this divorce was contrary to natural justice, in that she had no notice of the proceedings, and he referred to two cases in support of this proposition: *Shaw v. Attorney-General* (4) and *Rudd v. Rudd* (5). In both cases the English courts refused to recognize a divorce granted by the court of a country in which the parties were not domiciled at the commencement of the suit.

In *Shaw v. Attorney-General* (6), Lord Penzance in the course of his judgment stated that: "[The judgment of the foreign "court] has in addition to the want of jurisdiction, the incurable "vice of being contrary to natural justice, because the proceedings "are ex parte and take place in the absence of the party affected "by them". No notice of the proceedings in that case was personally served on the respondent, the citation being by advertisement which the respondent did not see. In the latter case

(4) L. R. 2 P. & M. 156.

(6) L. R. 2 P. & M. 156, 162.

(5) [1924] P. 72.

Horridge, J., not only based his decision on the want of jurisdiction, but also on the ground that there had been no sufficient notice of the proceedings. The wife had been served by registered post to her last known address and by advertisement. There had in fact been substituted service analogous to that allowed by English courts, and the question of service seems to me to be a matter for the court which heard the case, provided that it was a court of competent jurisdiction, which it was held not to be in either case. I am of opinion that the true ratio decidendi of both cases was the want of jurisdiction.

In the present case there were no divorce proceedings, and no amount of notice would have enabled the wife to have contested the husband's unilateral declaration of divorce. I therefore reject this argument.

Counsel also argued that the marriage was an English one and could not be dissolved by the law of the husband's religion. The husband, by the law of his religion, has the power of unilateral and even capricious divorce, as well as the right to have two, three or four wives at one and the same time. These factors would have been implicit in the marriage contract, if the marriage had been a Mahomedan one. It must be borne in mind, however, that the declaration of divorce by the husband in accordance with the law of his religion is regarded as a valid divorce by the law of the domicile. On this point *Re v. Hammersmith Supt. Registrar of Marriages* (7) is of great assistance. In that case, which first came before the Divisional Court of the King's Bench Division and later before the Court of Appeal, it was held that a marriage solemnized in this country between a Mahomedan domiciled in India and a Christian woman cannot be dissolved by the husband handing to the wife a "writing of divorcement" although that would be an appropriate means of effecting the dissolution of a Mahomedan marriage according to Mahomedan law. Viscount Reading, C.J., in the course of his judgment in the Divisional Court, states (8): "Neither authority nor principle can be found in English law to establish the proposition that a marriage contracted in England is dissolved according to the law of England by mere operation of the laws of the religion of the husband and without decree of a court of law"; and (9): "An Englishwoman . . . domiciled in England who marries in England a person domiciled . . . out of the realm of England, acquires by the status of marriage the

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(7) [1917] 1 K. B. 634.

(9) *Ibid.* 643.(8) *Ibid.* 642.

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"domicil of the husband and is subject to the law of that
 "domicil, but she does not acquire his religion or become subject
 "to the laws of his religion except in so far as they are the law
 "of his domicil, and then to that extent only". I do not think
 that the Lord Chief Justice in stating that the wife became
 subject to the law of her husband's domicile meant to detract in
 any way from his previous statement that there must be a decree
 of divorce of a court of law.

Swinfen Eady, L.J., in the course of his judgment in the
 Court of Appeal, said (10): "Under these circumstances the
 "marriage which was celebrated between the appellant and
 "Ruby Hudd on March 18, 1913, has not been dissolved by any
 "court of competent jurisdiction (the appellant says there is
 "none), and it is not a marriage in the Mahomedan sense which
 "can be dissolved in the Mahomedan manner". Later in his
 judgment Swinfen Eady, L.J., quoted Lord Brougham in
Warrender v. Warrender (11): "If there were a country in
 "which marriage could be dissolved without any judicial
 "proceeding at all, merely by the parties agreeing in pais to
 "separate, every other country ought to sanction a separation
 "had in pais there, and uphold a second marriage contracted
 "after such a separation. It may safely be asserted that so
 "absurd a proposition never could for a moment be enter-
 "tained".

The marriage between the wife and the husband was a civil
 marriage under the Marriage Acts, 1811 to 1939, which laid down
 certain regulations for the contracting of monogamous marriages.
 It was a marriage in the Christian sense, and cannot be dissolved
 by a method of divorce which is appropriate to a polygamous
 union.

I therefore find that the marriage solemnized between the
 wife and the husband is a valid and subsisting marriage, the
 Mahomedan divorce being inappropriate to such a union. To
 hold otherwise would not only be contrary to the law as I under-
 stand it, but would both encourage and sanction the purely
 temporary union of English women and foreigners professing the
 Mahomedan religion during their limited residence in this country.

I am, however, satisfied that the charge of desertion has been
 established, and I consider that this is a proper case to exercise
 discretion in favour of the wife; and, as she has resided in

(10) [1917] 1 K. B. 634, 659.

(11) (1835) 2 Cl. & Fin. 488, 534.

England ever since her marriage in March, 1946, I pronounce a decree nisi.

Decree nisi.

Solicitors: *Gery & Brooks.*

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Feb. 5, 6,
7, 8, 9;
Mar. 16;
Apr. 3;
May 10.

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*Shipping—Prize—Occupation of German ports during hostilities—
Vessels in various stages of construction in building yards—
Informal seizure—Formal seizure after surrender of Germany—
Whether act of conscious volition to seize on capture of port essential—Whether subjects of maritime prize—Effect of enemy capitulation on right in prize.*

On May 4, 1945, the north-west area of Germany (embracing the ports of Emden, Lübeck and Flensburg) was surrendered to the Allied forces, and the whole of the German armed forces surrendered unconditionally at Rheims on May 7, and at Berlin on May 8. When the port of Emden was occupied on May 6 and 7 by the Canadian Army, the motor vessel *Hermes* was lying in the water, damaged and aground, within the port. When Lübeck was captured on May 2, Hull 347 (almost ready for launching) and Hull 348 (nearing completion) were on the stocks in a ship-building yard within the port. Flensburg, where Hulls 507 and 508 were on the stocks in the early stages of construction, was not occupied until May 10. The captors of the respective ports took no overt action to seize in prize or take possession of either the *Hermes* or the hulls, nor was any particular attention given to them at the time of occupation other than the appointment of a Royal Navy officer to control the port with the assistance of military guards. No German was permitted to enter the port without a pass, or to board any ship without authority. The documents of surrender of May 8 imposed on the Germans a cessation of active hostilities at a stated time, and, by a declaration of June 5, 1945, the Allied Powers assumed the government of all Germany. Writs for the condemnation as prize of the *Hermes* and the hulls were not issued until 1947. The German owners of the *Hermes* disputed that there was ever any lawful capture or seizure in prize of that vessel before the surrender of the German forces, and they claimed the release of the vessel to them. The building owners claimed the release to them of the Lübeck hulls on the ground that the yards and stocks formed no part of the port; that the structures were not of such a character as to be capable of condemnation in prize; and that ship-building yards were private property which was not within the jurisdiction

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of a prize court. The Flensburg building owners contended, in addition, that, Flensburg not having been occupied until May 10, the total surrender of the whole of the German armed forces had two days previously brought the rights of the captors to seize in prize to an end.

Held, (1.) that, when Lübeck was occupied on May 2, the circumstances existing then unquestionably permitted the exercise of any belligerent rights in prize. In the case of the port of Emden which was occupied on May 7, when the German North-West Army Group surrendered, the cessation of hostilities in that area by merely a part of the German armed forces did not bring to an end the rights of the captors to seize in prize. Nor, with regard to Flensburg which was occupied two days after the surrender of all the German armed forces, were rights of capture in prize lost, because it did not necessarily follow that hostilities ceased in all parts of the theatre of operations at the moment of surrender to the extent that an overt act of taking possession necessarily became a peaceable act as distinct from capture.

The Harmony (1815) 2 Dods. 78, considered. *The Pellworm* [1922] 1 A. C. 292 applied.

(2.) That the Lübeck and Flensburg structures and the stocks and building yards in which they lay constituted maritime property in a maritime town and were by their nature capable of capture and seizure as prize; that, although, when the ports were captured, there was no overt act or special intention shown by the captors to seize in prize or take possession, the hand of the captors was put on them at the moment when the respective ports were captured; and that it was not necessary that there should be conscious volition to seize by the captors at the time when the ports were occupied.

The Bellaman and The Agostino Bertani [1948] W. N. 370 distinguished. *The Three Motor Gunboats* (1917) Ll. P. C. 106; *The Progress* (1810) Edw. 210 applied.

Held, further, that there was therefore a hostile capture of the ports in which the *Hermes* and the structures respectively lay; that, being maritime property in a maritime town, they were captured bodily when the ports in which they lay were captured; and that every one of them was good and lawful prize and would be decreed condemnable accordingly.

APPLICATION by the Crown for condemnation as prize of the motor vessel *Hermes* and four hulls in course of construction.

The port of Emden was captured and occupied by the Canadian Army on May 6 and 7, 1945, when the *Hermes* was lying in the water incomplete, damaged and grounded. The application in respect of her was resisted on behalf of the Dampfschiffahrts-Gesellschaft Neptun who claimed the release of the vessel to them. There was no formal act of seizure in prize of the *Hermes* when Emden was captured, and there was a total surrender of the German armed forces on May 8. As regards the

Hermes, the facts are thus stated by Lord Merriman, P., in his judgment:—"It will be sufficient to take the example of the *Hermes* which, mutatis mutandis, covers all the rest. The writ was issued on August 13, 1947, and describes her as a ship whose port of registration is unknown, and as having been seized and taken as prize by H.M.S. *Royal Rupert*. Lieut. Clayton, an officer in H.M.S. *Royal Rupert*, swore on July 21, 1947, that he had been present at the capture of the *Hermes* lately taken by H.M. Ship of War. He swore that Klaus Dehde was her master or commander. A letter from Herr Dehde, dated Emden, July 23, 1947, is exhibited to one of the later affidavits. In this he says that she was seized by the Royal Navy as prize on July 21, 1947, and that he was made master of her for this act by the port controller, Mr. Cawthorne. As to this performance, save that I would substitute the word 'farce' for the word 'act', comment is needless in light of what is now admitted to have been the true position for more than two years before that date. Yet it was not until July 8, 1949, that the Procurator-General wrote to the claimants' solicitors to say that the Crown would contend that the vessel was seized when the port of Emden was captured and occupied on what was said, incorrectly, to be May 5, 1945, and would rely in this connexion on the decision in *The Bellaman and The Antonio Agostino* (1) but would not rely on the seizure which took place in 1947, by reason of the surrender of Germany and the Allies' declarations and other documents relating to the German surrender as well as of the decision of the Allied Military Control, this vessel and others had become in any event the property of His Majesty's Government".

Hull 347 and Hull 348 were still on the stocks at Lübeck when that port was occupied by military forces on May 2, and by naval forces on May 3. Hull 347 was almost ready for launching. About 70 per cent. of Hull 348 was completed but the outer sides and decks were only partly riveted. In determining whether they came within the definition and character of a "ship", it was unnecessary to draw any distinction between those structures.

Hull 507 and Hull 508 were on the stocks at Flensburg. Their state of construction was considerably less advanced. The ribs of Hull 507 were in position and half the plating was completed; the double bottom of Hull 508 had been laid and half the ribs

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(1) [1948] W. N. 370.

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were up. For the purposes of the present claims no distinction could be drawn between them. Flensburg was occupied by combined naval and military forces on May 10.

On behalf of the claimants it was contended, with regard to the *Hermes*, that that vessel was not seized in prize when Emden was occupied by the Allied forces; that the rights of belligerents to seize in prize ceased on the surrender of Germany; that there was no formal act of seizure before that, the material time; and that, after that date, there could not be any lawful seizure in prize. With regard to the Lübeck structures and the Flensburg structures, that for the same reasons there could be no lawful seizure in prize after the surrender of Germany, and also that they were not in such a state of construction as would bring them within the definition of "ship" for the purposes of the law of prize; and that in any event the four hulls were on the stocks in building yards and the yards did not form any part of the port and the hulls were not proper subjects for capture or seizure in prize. The Lübecker Flenderwerke A.G., the building owners of Hulls 347 and 348, claimed that they were entitled to the release to them of those hulls. The Schiffahrts Treuhand G.m.b.H. claimed similarly in respect of Hulls 507 and 508.

Sir Hartley Shawcross, A.-G., C. T. Le Quesne, K.C., and Maurice Rena for the Crown. It is submitted that a partial surrender of the armed forces of a belligerent power covering only a section of the territory involved in war does not operate in any way to diminish rights in prize: see *Lindo v. Rodney* (2). The total surrender of a belligerent does not, per se, cause the rights to seize in prize to be lost to the captor of them. It is well established that those rights cease after there has been a general cessation of hostilities. After the surrender of Germany on May 8, 1945, the situation was unprecedented in international law: the Allied forces did not assume control over Germany until June 5, 1945; the war was still going on; and Japan was still at war with the Allies. There is a distinction between the effect on prize rights where there is an armistice, and where there is a complete surrender. The old authorities show that the right of seizure continues—at least, for a time: see *The Foltina* (3). Nothing was said or done on May 8 that derogated from the rights in prize of the Allied Powers. The surrender did not constitute a "standstill", and the blockade continued in 1945, as it did in

(2) (1781) 2 Doug. 612 (note).

(3) (1841) 1 Dods. 450.

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1918 after the first world war. The rights to prize and to blockade are kept alive when there is an armistice unless there is a waiver. In *The Rannveig* (4) there was an agreement between the United States of America and neutral Norway to which Great Britain assented. The claimants rely on that decision, but it is not on all fours with the present case.

With regard to the question whether the capture of a port involves, in itself, the capture of the ships and maritime property within it, it is submitted that the intention is always formed before capture of a port that there will be a seizure of all the shipping within it; and it was unnecessary for the captor to indicate that intention by some overt act. [*The Bellaman and The Agostino Bertani* (5) and *The Ostmark* (6) referred to.]

Once it is conceded that a vessel is a "ship" as defined in prize law, the question of place does not affect the right of seizure as prize unless she be outside the captured port and in such a position that she can make her escape. Property, whether afloat or ashore, is not the test of what constitutes a "ship". Any goods having a maritime flavour found in a captured port are properly the subject of seizure in prize. [*The Roumanian* (7) referred to.] In the case of goods on land captured by naval forces, where they are such that the enemy can make potential use of them for carrying on hostilities they are the proper subject-matter of prize; and a fortiori when they have a maritime character. After June 5, 1945, the Allied Powers were not in belligerent occupation of Germany: they were the Sovereign Government of Germany. It is submitted that the question must be regarded as from the dates of the capture of the respective ports; and that the capture of a port results in the capture in prize of the ships within it.

[LORD MERRIMAN, P. The question is still left open whether the particular objects under construction or damaged were included in the order from the supreme authority to "seize all "shipping".]

It is submitted that when a port is captured there is a presumption of seizure in prize of all the ships and property of a maritime character within it, and that the burden of proving otherwise is on the owners of captured ships where they contest the condemnation as prize. The capture of a port automatically involves seizure in prize even though the captors do nothing more at the time to indicate their intentions: see *The Bellaman and*

(4) [1922] 1 A. C. 97.

(6) Not reported.

(5) [1948] W. N. 370.

(7) [1916] A. C. 124.

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The Agostino Bertani (8). What the captor does subsequently does not affect the quality of a prize once, by its capture or constructive capture, it is given the character of prize.

[LORD MERRIMAN, P. Property seized in prize must be brought before this court to be condemned or released by order of the court.]

The three ports in question here, it is submitted, were captured at times when prize rights subsisted. The *Hermes* and each and all of the four hull structures were a proper subject of seizure in prize and should be condemned accordingly.

Diplock, K.C., and *R. I. Threlfall* for the claimants. The sole question for the decision of the court in these five separate matters is "prize or no prize". It is submitted that in each case there never was any capture or seizure in prize and that the vessel and the four structures ought to be released to their respective owners. The most significant fact which shows that there was no intention on the part of the Crown to make prizes of these several objects before the complete and unconditional surrender is the action taken on the part of the captors to seize them in 1947. That, it is submitted, was two years too late. The Crown seems to have considered that there exists in the law of prize something in the nature of formal seizure as distinct from informal. That is fallacious: such a notion is wholly unknown in the law of prize. The expression "formal seizure" has crept into the law of prize since 1948; there was no trace of it before that year.

[LORD MERRIMAN, P. There can only be one seizure.]

Another fallacy in the Crown's argument is that capture or seizure in prize does not need an act of conscious volition on the part of the captor quoad the subject-matter. When these five matters first came before this court in 1948, it was clear from those proceedings that the Crown was then clearly under the misconception that it had in 1947 a right to seize in prize the vessels in question here.

The presumption that all the property within a captured port becomes the proper subject-matter of seizure in prize from the date of capture is rebuttable. It is submitted that there is no such doctrine that capture of a port by naval or military forces necessarily involves seizure in prize of everything in the port which is the proper subject-matter of prize. Still less is it so

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when a port is ceded. The Naval Prize Act, 1864, s. 34, which relates to the subject-matter over which the prize court has jurisdiction is a wide one with regard to ships, but limited as regards goods. The hostile occupation of a port does not necessarily involve seizure of all the goods within the port. The purpose of the Act was not to extend the jurisdiction: it was declaratory. The claimants do not seek to escape the decision in *The Bellaman and The Agostino Bertani* (8); indeed, they rely on it. It is doubtful whether the exercise of belligerent rights in prize is permitted during an armistice, unless they are expressly reserved; and, as an armistice is merely a suspension of hostilities, so much the less can prize rights be permissible after a total surrender, which involves an absolute cessation of hostilities. Where there is a total cessation of hostilities by one belligerent by surrender there is an implied contract on the part of the victors also to cease; and from the moment of surrender capture in prize cannot properly take place.

It is submitted that, in any event, the structures in Lübeck and Flensburg were not within a port at all: they were on the stocks in ship-building yards which did not form any part of the port: see *Hunter v. Northern Insurance Marine* (9).

Le Quesne, K.C., in reply. With regard to the question whether the structures on the stocks came within the definition of "ships", the test is whether, looking at any one of them, it can fairly be said, "that is a ship". Regard should be had to the purpose of a thing. Applying that test to these objects, they all clearly come within it and also within the several definitions which appear in the authorities.

[LORD MERRIMAN, P. Whether these vessels were "captured" is the more important question in the case.]

They were certainly captured when the port was captured, and from that moment onward. The surrender of the armed forces of Germany on May 8, 1945, was not the surrender of the territory. The capture by a naval force of something on land would be quite sufficient if it were done in exercise of a maritime right. As regards an armistice, truly so called, no rule has yet been settled as to what is a true armistice in regard to capture in prize. In the present case, however, it was a surrender and the right of capture still continued.

[LORD MERRIMAN, P. I understand your contention to be that capture is automatic from the moment of the overwhelming of a

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port irrespective of the intention of the captors at the time of taking over?]

It is quite clear that there was no special agreement between the belligerents that the right of capture should be given up by the victors on the surrender of the German forces. Regard should be had to the state of affairs which existed on May 8. It is submitted that all these vessels or structures are the proper subject of seizure in prize, were taken while prize rights existed, and should be condemned as such accordingly.

Cur. adv. vult.

May 10. LORD MERRIMAN, P., reading his judgment, stated the facts, and continued:—The questions for decision, it is agreed, may be stated as follows: (I) Were the ports in question respectively occupied in circumstances and at a time which permitted the exercise of any belligerent rights of prize therein? (II) If the ports were captured when they were respectively occupied, was their capture of such a nature as, ipso facto, to effect the capture of these objects respectively? (III) Were the Lübeck and Flensburg structures a proper subject of maritime prize or were they merely private property on land and, therefore, protected from confiscation by virtue of article 46 of The Hague Convention IV? (IV) In any event, assuming that for any of the above reasons any one or more of these objects is not liable to condemnation as good and lawful prize and therefore must be released, ought they nevertheless to be released to the Crown and not to the claimants because, as was said in the letter of July 8, 1949, from the Procurator-General to the claimants' solicitors, they have in consequence of the assumption of the government of Germany by the Declaration of June 5, 1945, and of what is the equivalent of German legislation thereunder, become the property of the Crown?

(I) The first question chiefly depends on the dates on which the ports were occupied respectively. It is conceded that this question must be answered in the affirmative as regards Lübeck. It is disputed, as regards both the other two ports, by reason of the surrender to Field-Marshal Montgomery at Luneberg on May 4 of the north-west area of Germany and, in any event, as regards Flensburg by reason of the documents of the total surrender of the German armed forces, signed respectively at Rheims on May 7 and Berlin on May 8, 1945. As Emden was occupied before either of these two later dates and Flensburg was occupied after both of them, it is immaterial whether May 7 or

May 8 is taken as the date of the total surrender. Both these documents imposed on the Germans a cessation of active hostilities at 23.01 hrs. Central European time on May 8. May 9 was the date celebrated in this country as "VE Day".

Counsel on behalf of the Crown was content to take this as the relevant date. Earlier in the argument Sir Hartley Shawcross suggested that by reason of a statement in all the documents of surrender that these were independent of and without prejudice to, and would be superseded by, any general instrument of surrender imposed by or on behalf of the Allied Powers and applicable to Germany and the armed forces as a whole, or words to the same effect, the relevant date is June 5, when the Declaration embodied in Cmd. 6648 was made. As I have already said I agree with his view that, for the reasons already given, belligerent rights of prize could not subsist after that date; but it does not follow from this that if a total surrender itself operates to bring these rights to an end they subsisted until that date. My opinion is that Mr. Le Quesne was right in accepting May 8 as the latest relevant date for the total surrender.

In my opinion the true effect of the Declaration of June 5, 1945, was to recite the total surrender of the German armed forces which had already taken place and to impose on the German people the government of the Allies in consequence of that surrender. This issue, therefore, is narrowed down to the question whether His Majesty's forces could exercise belligerent rights of prize in Flensburg, whether May 4 or May 8 is taken as the date of total surrender in that area, and, as regards Emden, whether those rights survived the Luneberg surrender on May 4. As to this point, it is true that the surrender to Field-Marshal Montgomery was a complete surrender of the German forces in the XXI Army Group Area, in which all three ports were situated. But, on any view of the matter, I do not think that this surrender can be described as a general cessation of hostilities. The very fact that the rest of the German armed forces did not surrender until three or four days later implies that they might attempt to carry on hostilities in that area, if only by air. In my opinion, therefore, May 8 is the only date that matters. If so, the issue is further narrowed to the occupation of Flensburg. But, whether I am right or wrong in this respect, the question of principle remains to be determined.

As to this, the claimants' argument may be summarized as follows: it is at the very least doubtful whether the exercise of belligerent rights in prize is permitted during an armistice, unless

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they are expressly reserved; and, seeing that an armistice is a mere suspension of hostilities, so much the less can the exercise of these rights be permissible after a total surrender, which involves an absolute cessation of hostilities. The argument is attractive at first sight, but it requires an examination of the question whether a total surrender is merely an armistice in a permanent form or whether, as the Crown suggests, the two things are of an essentially different nature.

In considering the essential characteristics of a surrender, it may not be inapt to begin with a simple example. Under the threat of the guns of the captors' ship, a vessel strikes her colours: does that necessarily mean that the capture is complete at the moment when she does so, and that, for example, putting a prize crew on board is not a hostile action because in fact no further opposition is offered? In *The Rebeckah* (10) the question was whether the capture was a droit of Admiralty or was prize to the naval captors. This depended on whether the ship was captured when lying at anchor in a port or haven, or whether the capture was made by naval officers in their naval character.

Sir William Scott there said (11): "The first question that will occur applies to the time of the capture, whether that is to be dated from the actual taking possession, or the previous striking of the colours; and I think that the striking of the colours is to be deemed the real deditio. If the French had succeeded in their attempt to defeat that surrender, then the actual final taking of possession must have been alone considered. But as that attempt failed, I am of opinion that the act of formal submission, having never been effectively discontinued, must be deemed the consummation of the capture". Sir William Scott, having also determined that the surrender was made not in the roadstead but when the vessel was only about to enter it, and having dealt with other points which have no bearing on the question at issue, condemned the vessel to the captors in prize.

In *The Edward and Mary* (12), a claim for prize salvage of a British merchantman taken by a French privateer, Sir William Scott said (13): "The master, I must observe, has given an improper deposition, and very ill according with the entries in his log-book: By that it appears that the French vessel brought him to, and declared herself a French privateer, and ordered him to lie to; but owing to the boisterous state of the weather, she did not send a man on board. I can by no means agree

(10) (1799) 1 Ch. Rob. 227.

(11) Ibid., 233.

(12) (1801) 3 Ch. Rob. 305.

(13) Ibid., 306.

“to what has been advanced in argument, that it was on this account *no capture*. The sending of a prize master on board is a very natural overt act of possession, but by no means essential to constitute a capture. If the merchantman was obliged to lie to and obey the direction of the French lugger, and await her further orders, she was completely under the dominion of the enemy; there was no ability to resist and no prospect of escape. The Frenchman, who has been examined, appears to have given the true account: he says ‘that he understood it to be a capture’. There have been many instances of *capture* where no man has been put on board, as in ships driven on shore, or into port”.

But in my opinion it does not follow from these cases that hostilities between the captor and the captured ship cease at the moment when the prize strikes her colours, and that the overt act of taking possession is a peaceable act distinct from the capture. This very question arose in *The Pellworm* (14), which decided that when an enemy merchant ship had hauled down her flag on the approach of a British cruiser outside neutral territorial waters, but had succeeded in manœuvring herself within territorial waters before she was boarded and taken possession of by a prize crew, the capture was within the territorial waters and the prize could not be retained.

In giving the judgment of the Privy Council, Lord Sumner said (15): “In principle it would seem that capture consists in compelling the vessel captured to conform to the captor’s will. When that is done, *deditio* is complete, even though there may be on the part of the prize an intention to seize an opportunity of escape, should it present itself. Submission must be judged by action, or by abstention from action; it cannot depend on mere intention, though proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous, and did not result in a completed capture. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary: *The Esperanza* (16). A ship may be truly captured, though she is neither fired on nor boarded (*The Edward and Mary* (17)), if, for example, she is constrained to lead the way for the capturing vessel under orders, or to follow her lead, or directs her course to a port or other destination, as commanded. If she has to be boarded, she is at any

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(14) [1922] 1 A. C. 292.

(15) *Ibid.* 302.

(16) (1822) 1 Hag. Adm. 85, 91.

(17) 3 Ch. Rob. 305.

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“ rate taken as prize when resistance has completely ceased. It
 “ was contended before their Lordships by counsel for the Crown
 “ that hauling down the flag was conclusive in the present case, or
 “ at least was conclusive when taken in conjunction with stopping
 “ the engines as ordered. It was said to be an unequivocal act
 “ of submission, as eloquent as the words ‘ I surrender ’ could
 “ have been, an act which could not be qualified by any intention
 “ that did not find expression in action.

“ This is to press *The Rebeckah* (18) beyond what it will bear,
 “ for there the facts showed that, after the act of formal submis-
 “ sion by striking colours, there was no discontinuance of that
 “ submission either effectively or at all, whereas Sir William
 “ Scott intimates that, if any attempt had been made to defeat
 “ the surrender, he would not have treated the *deditio* as com-
 “ plete till possession was actually taken. It is true that by
 “ tradition, when ships are engaged in combat, striking the colours
 “ is an accepted sign of surrender, but to do so without also
 “ ceasing resistance is to invite and to justify further severe
 “ measures by the victorious combatant. In the case of a
 “ merchantman, where the traditions of commissioned men-of-war
 “ are not of equal application, the hauling down of the flag, like
 “ any other sign or act of submission, is to be tested by inquiring
 “ whether the prize has submitted to the captor’s will. What
 “ a combatant seeks to intimate by acts signifying surrender is
 “ first and foremost that he ceases to fight and submits to be
 “ taken prisoner; what a merchantman intimates is, that she
 “ means to do as she is told, and that the chattel property may
 “ be captured in prize, though the seamen in charge of it are not
 “ made prisoners, or placed under personal restraint ”.

Likewise, when a solitary seaboard fortress with its adjacent port is besieged by naval or naval and military forces, what difference can it make whether entry is effected by a landing party, *vi et armis*, through a breach in the walls made by the guns of the invading fleet, or unopposed through the city gates after a white flag had been hoisted over the citadel? No such distinction, as far as I am aware, has been drawn in prize law, and *Lindo v. Rodney* (19) and the case of the *Ships taken at Genoa* (20), which were both cases of capture of ports on surrender, are authorities to the contrary. But it is argued that in such cases the surrender was an isolated act while hostilities still continued over the theatre of war generally. Be it so. This

(18) 1 Ch. Rob. 227.

(20) (1803) 4 Ch. Rob. 388.

(19) 2 Doug. 613 (n.).

seems to be merely saying that although the unopposed occupation of an isolated port which has surrendered unconditionally may properly be regarded as the capture of that port, the simultaneous hoisting of white flags, metaphorically speaking, in every such port within the whole theatre of operations involves the conclusion that no one of them can be said to be captured. In the absence of any authority for this proposition I am unable to accept it.

But it is said further that a total surrender whereby the vanquished enemy is obliged to cease hostilities imports an implied contract on the part of the victors to cease hostilities likewise; and that it follows therefrom that from the moment of surrender capture in prize cannot properly take place. If this is the true effect of a general surrender, why is it not equally true of the local or individual surrender whether of a ship or of a seaboard fortress? It is true that the ship may be rescued, or that the tables may be turned, as in the case of the *Ships taken at Genoa* (20), by a victory of the enemy elsewhere; but until either of these events happens how can it be said that the imposition of the will of the victor upon the fortress or ship is either more or less hostile in character than the imposition of the will of the victor upon the totality of similar fortresses or ships throughout the enemy's territory?

This may be tested by considering what happened to these ports after the surrender. So far from there being any obligation upon the Allies to lay down their arms, it is, I think, indisputable that, as in the case of the boarding party on the one hand or the landing party on the other, the naval and military forces which occupied these ports advanced, figuratively speaking, in full panoply with all appropriate precautions to guard against surprise and if necessary to impose their will on the surrendered enemy. Even if no force was openly displayed, it was there in reserve.

If I may be permitted to paraphrase the concluding passage quoted from Lord Sumner's judgment in *The Pellworm* (21) in terms of this case, I would do so as follows: "What the commanders of the German armed forces sought to intimate by acts signifying surrender was, first and foremost, that they ceased to fight and submitted to being taken prisoner, and in relation to their ports, to intimate that they meant to do as they were told and that the maritime property therein might be captured in prize although those in charge of it were not made prisoners or

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(20) 4 Ch. Rob. 388.

(21) [1922] 1 A. C. 292.

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placed under personal restraint". The affidavit of Captain Petrie proves that measures were taken in these ports which were almost exactly analogous to putting a prize crew aboard a captured ship. The barbed wire fences, it is true, were not put up to imprison the Germans found in the ports, but they were put up to stop them from interfering with any maritime property therein. This, it seems to me, is the very antithesis of an implied contract that both sides shall refrain from any hostile act, and bears no resemblance to an armistice arranged on the terms that neither side shall do any belligerent act so long as it lasts.

It is, of course, well settled that belligerent rights in prize end with whatever may be the true cessation of hostilities: *The Harmony* (22). The headnote in this case reads: "The Prize Court of Admiralty has jurisdiction over cases of seizure as prize, although the same may have been effected after the time prescribed for the cessation of hostilities by a treaty of peace". To understand the point of the case it is essential to consider the relevant facts. As appears from a note on p. 56 of the same volume, the Treaty of Peace between Great Britain and the United States of America was signed on December 24, 1814, and was finally ratified on February 17, 1815. By one of its clauses it was agreed that, immediately after the ratification of the treaty by both parties, orders were to be sent to the armed forces and citizens of the two powers to cease from all hostilities and, to prevent causes of complaint which might arise on account of the prizes which might be taken at sea after the ratification, it was agreed that all vessels taken in the relevant part of the Atlantic Ocean after thirty days from the ratification should be restored on each side.

The *Harmony*, a British ship with a British cargo, was captured by an American privateer on March 2, 1815, who took away the master and the rest of the crew except the mate, and sent an American prize master, another American and five Frenchmen on board with directions to take the vessel to a port in the United States. On March 24, 1815, the mate, having previously ascertained that the Frenchmen would not oppose him, cut down the prize master with a hatchet and threw him overboard. He then brought the ship and cargo to England, where he caused both to be arrested in a suit for prize salvage by reason of recapture from the enemy. On May 6, the court decreed restitution to the owners of the vessel and the owners of the

cargo respectively on payment of 1,390*l.* to the prize salvor. Later, however, a claim was entered on behalf of the American captor and monitions were issued to show cause why the *Harmony* should not be decreed to be released from the recapture as having been effected after the time specified in the treaty of peace for the termination of hostilities, and why the same should not be delivered up to the claimant on behalf of the American captor.

After various proceedings which are irrelevant, and in spite of the submission by the owners of the vessel and the cargo that the prize court had no jurisdiction and that only an appellate court could set aside the original release to them, Lord Stowell held that he had jurisdiction to recall his original decision and that the original decree of restitution upon salvage ought to have no effect, and he ordered that ship and cargo be released from the recapture and delivered to the master of the American privateer. The significance of the judgment is that although Lord Stowell held that belligerent rights of prize had ceased at the date of recapture, he had jurisdiction to release the ship and cargo to the original captor although their capture was effected after the ratification of the peace treaty, but within the thirty days of grace. Rightly understood, this decision does not help the claimants.

But then, it is said, where is the line to be drawn? Is it to be suggested that the victors can continue seizing ships and goods in prize until the peace treaty is signed—it may be years later? I do not consider that any such conclusion necessarily follows. I do not doubt that short of the signing of a peace treaty victors may abrogate, expressly or impliedly, any rights that they have *jure belli*, including rights of prize. However that may be, in these cases it is conceded that such rights were abrogated by the Declaration signed at Berlin on June 5, 1945, but I see no reason for holding that the Crown had lost these rights because of anything which occurred before that date.

(II) On the question whether the capture of these ports was of such a nature as *ipso facto* to effect the capture of these objects respectively, the claimants put their case on three grounds: first, they submit that capture must be an act of conscious volition, and that, even in the case of the *Hermes*, which is admittedly a proper subject of prize capture, the history which I have related regarding her, taken with other matters to which I will refer, proves that it was not the intention of His Majesty's forces to seize her in prize when they occupied Emden, but on the contrary, her capture and seizure were expressly deferred to a time when no prize rights existed. Further, that everything that can

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be said in this respect with regard to the *Hermes* applies with even greater force to the Lübeck and Flensburg structures. As regards the Lübeck and Flensburg structures: secondly, it is submitted that their very nature leads to the opposite conclusion; and thirdly, that a shipbuilding yard and the stocks whereon ships are being built cannot be said to be part of a port.

I will first consider the argument that neither the Lübeck nor the Flensburg structures were in a port at all. It is suggested that, in contrast with a ship-repairing yard, a shipbuilding yard is not part of a port, and *Hunter v. Northern Insurance Marine* (23) is relied on in support of this proposition. An examination of the case in the Court of Session (23) and in the House of Lords (23), shows that the decision turned on the wording of a policy of insurance, the provisions of a local Act defining the limits of the Port of Greenock, and on the geography of the River Clyde. In my opinion that case affords no guidance in the present cases.

On the contrary, I think that *The Three Motor Gunboats* (24) tells the other way. These gunboats were sought to be condemned as enemy property; they were being constructed at Southampton to the order of the Turkish government and were seized as prize in the builders' works at Woolston in the port of Southampton in November, 1914. It was proved that at the time of the seizure the vessels were complete and had been tried and accepted by or on behalf of the Turkish government and that almost the whole of the purchase money had been paid. Sir Samuel Evans, P., inquired whether the seizure had occurred after his decision in *The Roumanian* (25). His question was clearly directed to the point that *The Roumanian* (25) was the earliest case in the first world war in which goods not actually on board or on the quayside had been condemned. So, when he was told that the gunboats had been seized before that judgment, he said that he assumed that they were already afloat, but was informed that they were still on the slips at the material date. Nevertheless, he condemned them.

Moreover, the affidavits of the representative in Germany of the Ministry of Transport afford prima facie evidence that these structures were found in the ports of Lübeck and Flensburg, respectively, when they were occupied by the Allies. If this statement is challenged it is for the claimants to displace it; but

(23) 13 App. Cas. 717; 14 R. 144.

(25) [1915] P. 26.

(24) (1917) 7 Ll. P. C. 106.

the affidavits in support of the claim contain no evidence that the stocks on which these structures were being built were not part of the respective ports. Accordingly, I find there is nothing in this point.

It will be more convenient to consider the nature of the Lübeck and Flensburg structures in connexion with the question whether they are proper subjects of maritime prize. But I bear in mind that there is a close relation between this question and the third question, for, just as it is argued that the very nature of these structures is relevant to the question whether there was any intention to seize them at the material time, so the alleged absence of any such intention is relevant to the question whether they are, or are not, proper subjects of prize.

This brings me to the cardinal issue on the present question, that is to say, whether the capture of a given object must be an act of conscious volition.

In the forefront of the claimants' argument is put the fact that, until the formal amendments of the writs were made in the course of the hearing, the alleged seizure in prize of these objects was sworn to have taken place in 1947, and that there is no evidence whatever of any intention to effect their capture or seizure before that date. Indeed, it is suggested that it cannot be assumed that those advising the Crown realized, even in 1947, that it was then much too late to make prize seizures in Germany, but that this consideration first emerged, if not in the course of this hearing, at any rate in the course of the earlier proceedings to which allusion has already been made.

Accordingly it is argued, as a matter of law, that there must either be or not be a seizure in prize at a given moment, and that it is a fallacy to suppose that there can be a formal seizure at a later date of things which are said to have been seized informally at an earlier date. But if there is any distinction between the actual capture and a formal seizure in prize, each, it is said, requires an act of conscious volition. The very fact that, even in 1948, those acting for the Crown thought (as is shown by the history of these cases), that the exercise of prize rights still subsisted after June 5, 1945, affords, if not conclusive, at least most cogent evidence that they were first consciously exercised in 1947.

While it is recognized that in this court I ought to follow my own decision in *The Bellaman* and *The Agostino Bertani* (26),

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that case is distinguished on the ground that the belated action taken in connexion with the ships in question was nevertheless in time, having regard to the express terms of the Italian Peace Treaty, whereas in the present cases it is suggested that all the available documents go to show that express instructions were given that there was to be no seizure until the actual completion of these objects as ships. It is submitted that there is no such doctrine as that the hostile capture by naval forces of a port necessarily involves the seizure in prize of everything in that port, or even of everything in that port which is a proper subject of prize. While it is admitted that a hostile capture of a port raises a *prima facie* presumption that ships found there are captured with the port itself (see *The Progress* (27)) it is argued that the presumption is rebuttable, and that the less a particular structure has acquired the character of a fully built ship by so much the more readily should the presumption be held to be rebutted.

In arguing that capture in prize involves an act of conscious volition and that no such act took place until 1947, over two years too late, the claimants rely not only on the history of these cases exemplified by that of the *Hermes*, but on contemporary instructions given in 1945. In particular, they rely on the affidavit of an Assistant Secretary in the Admiralty and Head of the Naval Law Branch of the Secretary's Department, dated January 18, 1951. He says that he is not allowed to disclose the contents of signals because they were sent in secret cypher.

The affidavit continues: "4. I have read the signals and can say that in December, 1944, the Combined Chiefs of Staff agreed on the following policies concerning enemy ships captured before the surrender of Germany: (a) For operational purposes supreme commanders were to have first claim on enemy ships taken in ports within their commands just as they had on ex-allied ships. (b) When supreme commanders had no further need for military operations of enemy merchant ships captured or found in ports within their commands these were to be transferred to representatives of the Combined Shipping Adjustments Board. Arrangements for manning and operation would then be made within the Combined Shipping pool, but such ships were to remain subject to all claims including salvage claims and were to be accounted for in the final shipping settlement.

"5. On May 14, 1945, instructions were sent by the Combined

“ Chiefs of Staff to General Eisenhower that unless otherwise
“ directed the policies referred to in paragraph 4 hereof should be
“ applied to all German shipping captured by forces under General
“ Eisenhower’s Command in German ports before the surrender or
“ declaration of defeat of Germany. 6. Further instructions were
“ given on this date to General Eisenhower that captured ships
“ were to be seized as prize except for fishing-craft, inland water
“ craft and vessels needed for local service with German crews.
“ Seizure was to be effected in Bremen and Bremerhaven by the
“ United States Navy and in other ports by the Royal Navy.

“ 7. Further instructions were to follow regarding the treatment
“ of shipping falling into the hands of the Allied Expeditionary
“ Force upon surrender or declaration of defeat. On June 8,
“ 1945, instructions were sent by the Admiralty to the Naval
“ Authorities in Germany referring to the seizure of German ships
“ in prize. A paraphrase of this signal is annexed to this affidavit
“ and is marked ‘ A ’”. The paraphrase is as follows: “ Subject
“ German ships seized in prize. Vessels are if possible to be
“ seized in ports of Germany or in ports occupied recently.
“ Vessels to be accompanied to U.K. with affidavits of seizure in
“ hands of officer commanding armed guard. These affidavits to
“ be delivered to N.O.I.C. at arrival port. At such port affidavit
“ to be delivered by N.O.I.C. to customs officer. Vessels not to
“ be seized until at point of departure for U.K. by reason
“ uncertainty regarding arrangements for refitting ”.

While it is admitted that too much reliance cannot be placed
on the wording of signals which are not textually quoted, it is
argued that a clear distinction is drawn between enemy ships
captured before the surrender of Germany, or ships captured by
forces in German ports before the surrender or declaration of the
defeat of Germany on the one hand, and the further instructions
that were to follow regarding the treatment of ships falling into
the hands of the Allied Expeditionary Force on the surrender or
declaration of defeat. It is said that these objects all fall into
the latter group as distinct from ships or shipping captured on the
high seas or in German ports before the surrender, and that, with
regard to the class containing these objects, the first instructions
were contained in the signal of June 8, 1945, paraphrased in
exhibit A to the affidavit, and that the instructions given in that
signal are now admitted to have been given three days too late.

Moreover, it is argued, not merely was seizure under these
instructions too late with regard to actual ships falling into the
hands of the Allies on surrender or declaration of defeat, but the

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signal contained express instructions that objects such as these were not to be seized until at point of departure for the United Kingdom, by reason of uncertainty regarding arrangements for refitting. Admittedly none of these things, as their history shows, was completed until 1947, hence the farce of seizure at that time, all of which, it is said, is utterly inconsistent with any intention to seize these objects, at any rate at the time when these ports respectively were occupied by virtue of the surrender.

This is a very formidable argument. On the other hand, it was pointed out that the instructions regarding ships captured before the surrender of Germany were clearly designed to facilitate the use of these ships, no doubt through the machinery of the Allies' respective prize courts, for operations against Japan. As regards shipping falling into Allied hands on surrender or declaration of defeat, it is pointed out that there is a well-recognized distinction between the original capture and the procedural seizure by, for example, nailing the writ to the mast, and it is argued that having regard to the fact that the signal of June 8, 1945, is admittedly a paraphrase it is not inconsistent with the recognition of this distinction. That is to say, in the first sentence the word "seized" may well refer to ships already captured, while the words "to be seized" in the second and the last sentences respectively may be taken to refer to a procedural seizure later. Even so, this contemporary evidence plainly suggests, at the least, that there was no act of conscious volition to seize the objects in prize at any time before June 5, 1945, after which, if capture had not already been effected, it was too late.

But behind all this lies the vital question whether every capture in prize necessarily involves an act of conscious volition at all. Manifestly this will usually be so as a matter of fact. For example, the capture of an individual ship on the high seas almost necessarily involves, as has already been seen, some overt act such as putting a prize crew on board, which imports that the capture was an act of conscious volition. But in my opinion the suggestion that an act of conscious volition is necessary either to prize capture or to prize salvage is in direct conflict with Sir William Scott's judgment in *The Progress* (28).

That case concerned a claim for salvage on ships recaptured from the French at Oporto by the allied British and Portuguese army under Lord Wellington. It is unnecessary for the purpose of these cases to consider the difficulties which Sir William Scott

felt concerning the absence of any conjoint operation by the navy and army in the capture of Oporto, or as regards the limits which must be set to the right of the military to claim prize salvage because their operations in a distant sphere led indirectly to the relief of all ports within the area of operations. Expressing his opinion generally, he said (28): "I think I may consider it as "decided in fact, that the French had captured these ships, and "were actually in possession of them; it is not necessary to shew "that they had taken formal possession of each individual ship, "because they had possession of the port itself; and the taking of "that which contained the vessels is in effect the same as taking "bodily possession of the ships themselves. It is *likewise*"—(the italics are mine)—"clear in point of principle, that it is not "necessary that it should be primarily the intention of the captor "to recover the property. It might not be in his immediate "contemplation, perhaps not even within his knowledge; and yet, "if the service is performed, if the recovery of the property is "the immediate and necessary result of what he has done, he "will be entitled to salvage". The word "*likewise*" in the first line of p. 211 is, as I said in *The Bellaman* (29), highly significant.

Again, when the judgment was resumed at a later date, Sir William Scott said (30): "But I thought that, under all the "circumstances, there was sufficient to satisfy the court that, "although in some instances no actual possession had been taken, "yet that the ships had been sufficiently reduced under the "bodily possession of the French army to entitle them to be "considered as captors". And after saying that the case still remained in some degree of obscurity, for there was no evidence as to the part which the navy took in the recapture, and that all the cases he could recollect were cases of joint service, while there was here no proof of co-operation, which was to be regretted, he said (31): "I do not see why the claim of the army may not "be established on principle, if it can be shown that *maritime "property in a maritime town*"—(the italics are mine)—"has "been recovered by its efforts directed to that purpose".

When once the question of the capture of the ports upon surrender is determined, we are concerned with the alleged capture of maritime property in a maritime town, in spite of the fact that no formal possession was taken of any individual

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(28) Edw. 210.

(30) Edw. 210, 213.

(29) [1948] W. N. 370; 1 Ll. P. C.

(31) Ibid. 214.

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object, and without it being primarily the intention to capture any individual piece of property, the capture of which, I will assume, was not in immediate contemplation or even within the knowledge of those who captured the ports respectively. I have no doubt which way Sir William Scott would have decided this question of conscious volition. For what it is worth, founding myself on his judgment, I came to the same conclusion in *The Bellaman* (32); but if this argument had convinced me that I was wrong I should not hesitate to say so.

In *The Bellaman* (32) when Tripoli was captured on January 23, 1943, it was reasonably clear that no particular attention was paid either to the *Bellaman* or the *Agostino Bertani* or to any other vessel lying sunk in the harbour. From this it was argued that seizure in prize was never contemplated, at any rate until long afterwards, and that, in effect, the ships were only regarded as obstructions to the harbour to be cleared away as soon as possible. On September 3, 1943, an armistice was signed with Italy which admittedly precluded any seizure in prize so long as it continued. It was not until some time in 1944 that the Admiralty signal was sent directing that any such vessels as might be salvaged should be seized in prize and placed in the custody of the Admiralty Marshal's substitute. Although these instructions could not lead to a valid seizure, the time for which had passed by virtue of the terms of the armistice, I thought that they were not inconsistent with capture having already been effected. Then, in 1947, there was the same sort of performance of a purported seizure as in the present cases, which was manifestly dictated by the impending signature of a peace treaty with Italy.

Likewise, as regards the Lübeck and Flensburg structures, I have little doubt that at the moment when these two ports were occupied no particular attention was paid to the question whether these structures were being captured in prize. The language of the Admiralty signal on June 8, 1945, is, as I have already said, ambiguous. Subject to this point there is a fairly close analogy between it and the signal quoted in *The Bellaman* (32). Like that, it was out of date, but it shows an appreciation that ships in the occupied harbours were subjects of prize. Like that, it directs that seizure shall take place on some future event—in the one case when salvage operations are complete, in the other when the vessels are ready to depart for the United Kingdom.

In the present cases, as in *The Bellaman* (32), nothing more was done until these events happened, in each case in 1947, when the purported seizure in prize took place. In my opinion there is no essential distinction between the two cases. In each case there was no special intention to capture the particular objects, and no overt act of capture save in so far as that was involved in the capture of the port.

In *The Ixion* (33), decided on March 2, 1915, Sir Samuel Evans, P., with regard to mistaken notions about the date of capture and the habit of deponents, which appears meanwhile to have become inveterate, of swearing to the wrong date of capture, said something which touches this point. The case, so far as I am aware, is only reported in the official transcript. Here again it is important to bear in mind that his judgment in *The Roumanian* (34) was under appeal to the Privy Council. It might still be open to doubt, therefore, whether, and in what circumstances, a cargo unladen and stored on land in this country was liable to capture.

As to this, Sir Samuel Evans, P., said (34): "Then a question has been raised . . . as to whether the property was seized on land or on board ship or in port. Now what was done in this case apparently was what has been done by the officers of customs acting for the Crown in nearly all these cases of seizure of cargoes coming in after the outbreak of war. This vessel, the *Ixion*, arrived on October 2, and the hand of the captors is put upon these goods on October 3. It has become a habit of some of the deponents to say that the formal seizure was not made till afterwards. This is not in my view the proper construction to be put on what was done. What is done is this. 'We seized these goods on October 3'—applying the facts of this case to what is done—'but we will take no serious steps by way of removal of the goods or otherwise for some time until we see what the actual facts are'. Then a little later on, I think in this case on October 17, further investigations having been made, the seizure which in fact took place *for all purposes of the law*"—(the italics are mine)—"on October 3 was completed on October 17 by their saying that 'we shall adhere to the seizure which we made on October 3, having made investigation into the facts of the case'. It does not seem to me that there are any circumstances in this case at all which would

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(32) [1948] W. N. 370; 1 Ll. P. C.
(2nd series) 265.

(33) (1915) Not reported.

(34) [1915] P. 26.

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“tend to show that the seizure was on land, as was contended
“with reference to part of the goods in the case of *The Roumanian* (35), which came before me some months ago”.

In *The Sommeldijk* (36) the Court of Appeal considered the question whether a claim for damages for detention of a neutral vessel for forty-one days in exercise of the belligerent right of visit and search was a matter for the War Compensation Court or was in the exclusive jurisdiction of the prize court. The ship was detained in the Downs where she was searched, so far as was possible at sea, and was then ordered to London with an armed guard on board, and escorted by a destroyer. She was eventually taken to the Royal Albert Dock and was there thoroughly searched, her cargo being discharged for that purpose. The search being completed, the cargo was re-loaded and she was allowed to proceed, without ship or cargo being brought into the prize court for adjudication. The court was unanimous in holding that the jurisdiction to award or refuse damages was in the prize court.

Bankes, L.J., after quoting the commission issued at the beginning of the first world war, and, I may add, also issued in the recent war, said (37): “The question for decision in the present case is whether the modern practice of carrying out the right of visit and search constitutes a seizure within the meaning of the commission. In the absence of any authority to the contrary it would seem that the means adopted under the present practice of carrying out a visit and search would amply justify a finding of a seizure”. After quoting a passage from Oppenheim dealing with the question of the search of vessels, and referring to the fact that in *The Roumanian* (38) Lord Parker, delivering the opinion of the Privy Council, held that the actual seizure took place when a letter from the Customs House stating that the cargo of petroleum was placed under detention was delivered on board the ship, at a time when only a comparatively small part of the cargo remained in the ship, the rest having been pumped into tanks some 100 to 150 yards from the wharf at which she lay, and not some weeks later when the writ was formally affixed to the tanks, Bankes, L.J., continued: “These authorities appear to me to afford strong confirmation of the view that the action of the naval authority in the present case amounted to a seizure which clothed the prize court with

(35) [1915] P. 26.

(36) (1925) 23 Ll. L. Rep. 119.

(37) Ibid. 121.

(38) [1915] P. 26.

“ authority to entertain the claim of the respondents to this
“ appeal ”.

Atkin, L.J., said (39): “ It may well be that a claim for
“ injury to goods or to person made against a person exercising
“ a belligerent right of search on the high seas, though neither
“ vessel nor goods were ever brought in, might be held to be
“ exclusively cognizable in the prize court. Good reasons could
“ be adduced why it should. But assuming that there must be
“ a capture as a condition precedent to jurisdiction in prize, it
“ appears to me that the forcible bringing in of a vessel under
“ an armed guard for purposes of search amounts to such a
“ capture. If there were an immediate intention at the com-
“ mencement of the operation to bring the vessel in for adjudica-
“ tion, there would be an obvious capture; and in my opinion it
“ makes no difference that the present intention is to bring her
“ in for search, with the further intention that if the search
“ results in a particular way to have the vessel or goods
“ adjudicated. It cannot be doubted that the practice of the
“ prize court in this country has been to act on this view ”.

It is right, however, to say that a German Prize Court has held, on the construction of the German Prize Code, that it is necessary to determine in each case what was the intention of the commander of the warship in bringing the vessel into port, and if the vessel was only brought into port for the purpose of visit and search she could not be considered captured even if the commander of the warship had placed a crew on board: see *The Bertha Elizabeth* (1915) *Jurisprudence Allemande en matière de Prises Maritimes*, at p. 45, and *The Niobe*, at p. 50.

In the present cases, however, as in *The Bellaman* (40), it was not merely a question of visit and search and release, but, however belatedly, these objects have actually been brought in for adjudication. In my opinion I ought to follow my own decision in *The Bellaman* (40) and hold that the hand of the captor was upon them from the moment when the ports respectively were occupied.

(III). As to the third question, whether the Lübeck and Flensburg structures are proper subjects of prize, the rival arguments may be summarized as follows: the claimants submit that there are two distinct subject-matters of prize: ships on the one hand, and on the other merchandise which has a maritime character, either because it is part of a cargo at sea, or at least

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(39) 23 Ll. L. Rep. 119, 123.

(40) [1948] W. N. 370; 1 Ll. P. C.
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is in port about to be laden, or having been unladen is still in port, or, if removed elsewhere, is in such a situation as not to have lost its character as cargo. As regards ships, I am bound by my own decisions to hold that a ship is none the less a ship because it has for the time being become unnavigable, and I am glad to know that this accords with a decision of the Japanese Prize Court in the Russo-Japanese War: see *The Thalia* (41), and of the Italian Prize Court in the first world war: see *The Beleno* (42).

But, while this is recognized, it is argued that a structure does not become a ship at all until it is either actually launched or at least has reached a stage of construction capable of being launched and floating. The claimants dispute that an embryo ship can be regarded as "goods" within the definition in the Naval Prize Act, 1864, s. 2, whereby that term "includes all such things as are by the course of Admiralty and the law of nations the subject of adjudication as prize (other than ships)". They assert that an object in course of construction as a ship either is or is not a ship, which term by the same section includes "vessel and boat, with the tackle, furniture, and apparel of the ship, vessel or boat". If it is merely in process of acquiring that character it has not become a ship, yet cannot be regarded as "goods".

The Crown, on the other hand, points out first of all that neither of these definitions is expressed as being exhaustive; that the Naval Prize Act, 1864, is an Act for regulating procedure in prize, but not for declaring the law of prize; that both definitions merely say that certain things are "included" in the terms "ships" and "goods" respectively; and that neither definition excludes these structures: see *Mellows v. Low* (43). But, even if they cannot be described as "ships", it is urged that they are such things as are by the course of Admiralty and the law of nations the subject of adjudication in prize.

I propose to begin with the assumption that these structures cannot be described as "ships" and that it is necessary to determine whether they are "such things (other than ships) as are by the course of Admiralty and the law of nations the subject of adjudication in prize".

In Story's *Notes on the Principles and Practice of Prize Courts*, at p. 28, the principles are thus stated: "As preliminary

(41) (1904) 2 Russ. & Jap. P. C.
116.

(42) (1917) Not reported.

(43) [1923] 1 K. B. 522, 526.

"to the subject it may be observed, that the ordinary prize jurisdiction of the Admiralty extends to all captures made on the sea, jure belli; to captures in foreign ports and harbours; to captures made on land by naval forces, and upon surrenders to naval forces"—(the italics are mine)—"either solely or by joint operations with land forces; and this, whether the property so captured be goods, ships or mere choses in action; to captures made in rivers, ports and harbours of the captors' own country; to money received as a ransom or commutation on a capitulation to naval forces alone, or jointly with land forces". Sir Samuel Evans, P., quoted this statement with approval in *The Frederick VIII* (44) in connexion with the above definition of "goods".

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The passage in *Story* is based in the main on the decision of Lord Mansfield in *Lindo v. Rodney*, reported in a footnote to *Le Caux v. Eden* (45). It is worth noting in passing that, as appears from the end of the note, another action against Admiral Rodney in which the same question arose was tried by Lord Mansfield, in which he gave the same judgment without further argument, which was affirmed on appeal to the House of Lords. In effect, therefore, the judgment in *Lindo v. Rodney* (45) itself has the authority of the House of Lords. The case arose on a rule to show cause why a prohibition should not be issued to the judge of the Admiralty from proceeding to the condemnation of goods taken and seized by His Majesty's land and sea forces under the command of Admiral Rodney and General Vaughan at the Island of St. Eustatius and its dependencies on the surrender thereof, as good and lawful prize.

The circumstances of the surrender of the Island of St. Eustatius on February 3, 1781, are set out in the Annual Register for 1781, at p. 102. As the report of the case shows, various goods, wares, merchandise, arms, stores and ammunition were taken and seized on such surrender and all persons concerned were cited to show cause why they should not be pronounced to have belonged at the time of the capture and seizure to the King's enemies as goods of enemies, or otherwise liable to confiscation. The rule for the prohibition was discharged. The ground on which the prohibition was prayed was that the goods were taken on land, and Lord Mansfield said that the only question was whether the goods, being taken on land, though in consequence of surrender to ships at sea, excluded the only prize jurisdiction

(44) [1917] P. 43, 45.

(45) (1781) 2 Doug. 594, 613.

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known in the kingdom. After an examination of the essential difference between the prize court and a common-law court, or even between the Admiralty Court when sitting in prize and when sitting in instance, and having expressly refrained from entering into any discussion as to plunder or booty in a mere continental land war without the presence or intervention of any ships or their crews, Lord Mansfield poses the question thus (46): "The question then is, whether such a capture ashore, "by a fleet of ships and the land and sea forces aboard, in consequence of a previous surrender of the place, is within the "jurisdiction of the court of prize". After noting (47) that the prize court has uniformly without objection tried all captures in ports, havens, etc., within the Realm, he says: "What is still "more extensive, foreign ports or harbours are not the high seas, "any more than the shore, but numberless captures made there "have been condemned as prize".

I will not dwell upon the terms of the commission, which, as I have already mentioned, was issued during the late war as in former times; but Lord Mansfield considers the reason of the thing; he said (48): "Mutual convenience, eternal principles of "justice, the wisest regulations of policy, and the consent of "nations, have established a system of procedure, a code of law, "and a court for the trial of prize. Every country sues in these "courts of the others, which are all governed by one and the "same law, equally known to each. The claimant is not obliged "to sue the captors for damages and undergo all the delay and "vexation to which he may think himself liable, if he sues by a "form of litigation, of which he is totally ignorant, and subjects "his property to the rules and authority of a municipal law by "which he is not bound. In short, every reason which created "a prize court as to things taken upon the high seas, holds "equally when they are thus taken at land. The original cause "of taking is here at sea. The force which terrified the place "into a surrender was at sea. If they had resisted, the force to "subdue would have been from the sea".

Later (49) Lord Mansfield referred to the judgment of Lee, C.J., in *Key & Hubbard v. Vincent Pearse* (50), in which he himself had been counsel: see *Le Caux v. Eden* (50).

That case also arose out of an attempt to prohibit the Admiralty from taking jurisdiction to condemn a ship belonging

(46) 2 Doug. 594, 614.

(47) Ibid. 614a.

(48) Ibid. 616.

(49) Ibid. 619.

(50) Ibid. 606-608.

to certain Irish merchants which had been taken, not upon the high seas, but, as was alleged, in the City of New York by a King's ship. On the ground, as Lord Mansfield summarized the judgment, that "the question, prize or no prize, is the boundary of a county within the realm", Lee, C.J., decided in favour of the commander of the King's ship, and in the course of his judgment said (51): "Though, therefore, I do agree that the jurisdiction of a Court of Admiralty, generally, is limited to matters arising super altum mare, and is, in that respect, local, yet I do not take it to be so in case of prize; for the jurisdiction does not depend on the locality, but the nature of the question, which is such as is not to be tried by any rules of the common law, but by a more general law, which is the law of nations". Finally, Lord Mansfield concluded (52): "If the question had been doubtful, arguments from utility and public convenience ought to have turned the scale. It could answer no good end, and must produce inextricable mischief, to captors, claimants, and the State, if goods taken upon land by ships, should not be within the prize jurisdiction". In passing I would observe that there is nothing in the passages quoted to assist the claimants on the two earlier questions.

But it is said: "This is all very well in the eighteenth century, but we are engaged in considering prize law in the twentieth century". There is no doubt, of course, that there has been a steady process of mitigation of the extreme rigour of prize law in modern times; but I was reminded by the claimants in connexion with the question whether total surrender ends the right to seize in prize, that the object of prize is still the coercion of the enemy by harassing and interfering with his navigation. No doubt; but let us see where that leads us.

In *The Roumanian* (53), Sir Samuel Evans, P., cited with approval Dana's note to Wheaton (8th ed., 1866), p. 451, note 171, under the heading "Distinction between Enemy's Property at Sea and on Land", which note states: "War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilization has recognized certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing

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(51) 2 Doug. 607.

(53) [1915] P. 26, 40.

(52) Ibid. 619.

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“ the power with which we are at war. If the hostile power has
 “ an interest in the property which is available to him for the
 “ purposes of war, that fact makes it *prima facie* a subject of
 “ capture. The enemy has such an interest in all convertible
 “ and mercantile property within his control, or belonging to
 “ persons who are living under his control, whether it be on land
 “ or at sea; for it is a subject of taxation, contribution and con-
 “ fiscation. The humanity and policy of modern times have
 “ abstained from the taking of private property, not liable to
 “ direct use in war, when on land ”.

The question whether the capture of any particular property is a justifiable means of coercion must in my opinion be tested as a matter of principle. For example, it must be irrelevant either that the object is so insignificant that by itself it makes no appreciable difference to the enemy's conduct of the war; or that the enemy is so nearly defeated that the seizure of one object more or less is in fact unnecessary inasmuch as it adds little or nothing to the coercion which is already being brought to bear on him; or that a proper subject of prize is in such a condition that it cannot be made serviceable in time to affect the enemy's powers to resist before the inevitable end occurs. Assuming these objects to be private property, can there be any doubt that they were of such a character and were so situated as to make their capture, in principle, a justifiable means of coercing the enemy? Can it be disputed that the enemy had an interest in these structures which were available to him for the purposes of war? And that he had such an interest because they were at least convertible property within his control or belonging to persons who were living under his control, whether it were on land or on sea, because he could make them the subject of a contribution or confiscation so as to be available for his war effort?

The claimants' argument seems to lead to somewhat absurd results. For example, a ship damaged by collision on her maiden voyage is being repaired by fitting a number of fresh plates: her sister ship, building in the same yard, has the same number of plates yet to be fitted. One is “ maritime property ” seizable in prize; the other is said not to be so. Consider also the plates themselves: in transit by sea from the steelworks to the port they would presumably be liable to seizure as contraband; so, I think, would they be when unladen on to the quay for delivery to the builder's yard. Yet when they are riveted into position they lose the character of “ maritime property ” in the one case

and keep it in the other. Indeed, I think that some guidance is to be obtained from the analogy of contraband cargo which is condemnable in spite of the Declaration of Paris, on the question whether, as Wheaton says, the convertibility of property to war-like uses is a test of the enemy's interest in the property so as to make it *prima facie* a subject of capture. It is the essence of contraband that the goods in question have an enemy destination and are capable of a war-like use, remembering that the words "war-like use" have a wide significance in their application to a totalitarian State: see *The Alwaki* (54) and *The Monte Contes* (55).

For example, parcels of floor polish and boot polish destined for Germany have been condemned as contraband on evidence that their chief component, beeswax, is extensively used as an ingredient of high explosive compositions and of waterproof compositions for sealing shells and bombs. The beeswax can be extracted by a simple chemical process; that is to say, the polish can readily be converted to war-like uses. But it is said that there is no analogy between such a case and the present, because cargo is in a separate category from ships. So it is in the sense that regarded merely as neutral cargo in an enemy bottom, or enemy property in a neutral bottom, the parcel of floor polish would be protected by the Declaration of Paris. It is the convertibility to war-like use that matters. The ships in Tripoli harbour were convertible to war-like use by salvage operations and a process of reconditioning. These structures are convertible to war-like use by the even simpler process of continuing the building upon lines already laid down. Save that in the case of the cargo it is also necessary to prove the enemy destination, either directly by the ship's documents or by the doctrine of a continuous voyage, while in the other two cases the enemy is in actual control at the moment of capture. I cannot see any intelligible distinction between these three classes of case.

At the end of it all the question "prize or no prize" seems to me to turn on the point from which one starts. If one starts by saying that good and lawful prize must be either a "ship", in the full sense of the word, or "goods", by which is meant cargo in a ship, or about to be laden in a ship, or just unladen from a ship, that is one thing. But if one goes to the fount of prize law to see whether the reason of it demands that there must be such a hard and fast rule, that is another. Beyond

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doubt the structures in question would have been held to be prize in Lord Mansfield's time.

The claimants have not satisfied me that there is any ground in reason, or on authority, for holding that any one of them is not prize now. On the contrary, I hold that there was a hostile capture of the ports in which they lay; and that, being "maritime property in a maritime town", they were captured bodily when the ports in which they lay were captured. I regard the procedural laxity and confusion as deplorable but not fatal. I am satisfied that every one of them is good and lawful prize, and I decree that they be condemned to the Crown accordingly. That being so, the other questions do not arise.

Decree accordingly.

Solicitors: *Treasury Solicitor; Freshfields.*

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April 5, 6;
May 10.Lord Asquith
of Bishopstone,
Birkett, L.J.,
and
Harman, J.

Husband and Wife—Alleged wilful neglect to maintain—Application to High Court—Existing deed of separation—Law Reform (Miscellaneous Provisions) Act, 1949 (12, 13 & 14 Geo. 6, c. 100), s. 5.

In June, 1932, a husband and wife entered into a deed of separation, the husband covenanting (if certain stipulations were observed) to pay such sum as after the deduction of income tax would amount to and leave the net yearly sum of 156*l*. Those payments were regularly made. The wife covenanted to support and maintain herself out of that provision and out of her separate estate, or otherwise. In December, 1949, the wife asked the husband to increase the amount payable under the deed of separation. This request was refused, and thereupon she took out a summons in the High Court for increased maintenance, alleging that her husband had wilfully neglected to provide reasonable maintenance for her. She further asked the court to order the husband to secure such payments as might be ordered.

In his affidavit the husband referred to the deed, and to the discharge of his liabilities under it, and said that he relied upon the deed and upon his wife's covenants in it "whether by way of estoppel or otherwise". It was conceded that since the date of the deed the husband's financial position had materially improved,

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

while that of the wife, who was suffering from spinal arthritis, had deteriorated.

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Barnard, J., held, ante, 223, refusing the wife's application, that, despite the change in the respective positions of the parties, the husband, who had faithfully carried out the terms of the deed, could not be held guilty of wilful neglect to maintain, which imported some element of matrimonial misconduct. On appeal by the wife:—

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Held, by Lord Asquith and Birkett, L.J.; Harman, J., dissenting, that the existence of the deed did not preclude the wife from applying to the court under s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, and that the court had jurisdiction to determine whether at the time of that application the husband was providing maintenance for the wife which was reasonable in the circumstances.

Morton v. Morton (1942) 111 L. J. (P.) 33 approved.

Per Harman, J.—A husband who merely declines to pay a greater sum than that stipulated in a deed is not guilty of "wilful neglect" to maintain within the meaning of s. 5 of the Act; the existence of a binding deed, providing present maintenance, the terms of which have been faithfully observed, is conclusive evidence that the husband has discharged his obligations.

APPEAL from Barnard, J. (1).

The applicant, Ellen Tulip, and the respondent, Joseph Edwin Tulip, were married in 1916. There were no children. On July 14, 1931, Langton, J., dismissed a petition by the husband for a decree of nullity of marriage on the ground of incapacity, and on June 30, 1932, the parties entered into a deed of separation, of which the following were the material clauses:—

Clause 1: "The wife may and shall henceforth during the life of the husband live separate and apart from him as if she were unmarried and shall be free from his marital control and neither of them the husband and the wife shall in any way molest or interfere with the other of them or the relations or friends of either nor shall require nor by any proceeding whatsoever attempt to compel the other of them to return to cohabitation nor shall take any proceedings to obtain a divorce or judicial separation on account of anything already done by the other of them".

Clause 3: "The husband hereby covenants for himself that if the wife shall so long perform and observe the stipulations herein on her part contained he during his life will pay to the wife during her life (if he shall so long live) for her separate use without power of anticipation such a sum as after deduction

C. A. " of Income Tax at the current rate shall amount to and leave the
 1951 " clear net yearly sum of 156*l.* such sum to be considered as

 TULIP " accruing from day to day and to be paid by equal monthly
v. " payments on the first day of every month the first of such
 TULIP. " payments to be made on the 1st day of July next but no

 " allowance or return of money shall be made in respect of any-
 " thing once paid under this present clause if the said annual
 " sum shall cease on any other day than the first day of any
 " month ".

Clause 4: " The wife shall out of the provision made for her
 " by these presents and out of her separate estate or otherwise
 " in all respects support and maintain herself and pay and dis-
 " charge all the debts engagements and liabilities which she may
 " incur or enter into and shall indemnify the husband his heirs
 " executors and administrators therefrom and from all actions
 " proceedings costs damages expenses claims demands and
 " liabilities on account thereof ".

There was no clause in the deed by which the wife undertook
 not to take any proceedings for maintenance in any future
 proceeding.

There was no resumption of cohabitation after the deed had
 been executed, and the husband continued to make regular pay-
 ments in accordance with its provisions.

After the deed was executed, however, the husband's financial
 position materially improved, while that of the wife, who had
 become an invalid suffering from spinal arthritis, deteriorated;
 and it was suggested for the wife that, were the court to consider
 the respective means of the parties for the purpose of making
 an order, such an order would, on the customary calculations,
 provide for maintenance of over 1,000*l.* a year less tax.

In December, 1949, the wife by her solicitors wrote to the
 husband asking him to increase the amount payable under the
 deed. The request was refused, and in 1950 the wife took out
 an originating summons under s. 5 of the Law Reform (Miscel-
 laneous Provisions) Act, 1949 (2) (now s. 23 of the Matrimonial

(2) Law Reform (Miscellaneous
 Provisions) Act, 1949, s. 5, sub-s. 1:
 " Where a husband has been guilty
 " of wilful neglect to provide reason-
 " able maintenance for his wife or the
 " infant children of the marriage, the
 " High Court in England, if it would
 " have jurisdiction to entertain pro-
 " ceedings by the wife for judicial
 " separation, may, on the application

" of the wife, order the husband to
 " make to her such periodical pay-
 " ments as may be just; and the
 " order may be enforced in the same
 " manner as an order for alimony in
 " proceedings for judicial separation ".

Sub-s. 2: " Where the court
 " makes an order under this section
 " for periodical payments, it may, if
 " it thinks fit, order that the husband

Causes Act, 1950) on the ground that her husband had wilfully neglected to provide reasonable maintenance for her. She further asked the court to order the husband to secure such payments as might be ordered. In his affidavit the husband said that he relied upon the deed and upon his wife's covenants in it "whether by way of estoppel or otherwise".

Barnard, J., held, refusing the wife's application, that, despite the change in the respective positions of the parties, the husband, who had faithfully carried out the terms of the deed, could not be held guilty of wilful neglect to maintain, which imported some element of matrimonial misconduct.

The wife appealed.

John Latey for the wife.

R. J. A. Temple, K.C., for the husband.

[In the course of the arguments which are set out in the judgment of Birkett, L.J., reference was made to the following authorities: *Hyman v. Hyman* (3); *Diggins v. Diggins* (4); *McCreaney v. McCreaney* (5); *Matthews v. Matthews* (6); *Morton v. Morton* (7); *Jones v. Newtown and Llanidloes Guardians* (8); *Dewe v. Dewe*; *Snowdon v. Snowdon* (9); *Weatherley v. Weatherley* (10); *Whittaker v. Whittaker* (11); *Papadopoulos v. Papadopoulos* (12); *Baker v. Baker* (13); *Morris v. Edmonds* (14); *Iles v. Iles* (15).]

Cur. adv. vult.

May 10. The following judgments were read:—

BIRKETT, L.J. I am authorized by Lord Asquith to say that he has read the judgment which I am about to read and that he agrees with it. [His Lordship read s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, and continued:—] Before the passing of the Act of 1949, the procedure to be followed by a

"shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by one of the conveying counsel of the court".

(3) [1929] A. C. 601, 628.

(4) [1927] P. 88, 92.

(5) (1928) 92 J. P. 44.

(6) [1932] P. 103.

(7) (1942) 111 L. J. (P.) 33, 34, 38.

(8) [1920] 3 K. B. 381.

(9) [1928] P. 113, 119, 120, 122.

(10) (1929) 46 T. L. R. 28, 29.

(11) (1939) 55 T. L. R. 1070.

(12) [1930] P. 55, 65, 66.

(13) (1950) 66 (Pt. 1) T. L. R. 81.

(14) (1897) 77 L. T. 56.

(15) (1931) 47 T. L. R. 396.

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C. A. wife seeking to show wilful neglect to provide reasonable maintenance was to apply under the Summary Jurisdiction (Married Women) Act, 1895, and the Acts extending and amending them.
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Strict limitation was placed upon the amount of maintenance that the justices could order the husband to pay; but by the Married Women (Maintenance) Act, 1949, the justices may now award up to 5*l.* a week instead of 2*l.* a week. Under the Act of 1949 the High Court can order the husband to pay any sum which it thinks reasonable; and, if it thinks fit, can also direct that that amount shall be secured. The Matrimonial Causes Act of 1950, by s. 23, now gives to the wife the right to apply to the court which had been given under the Act of 1949.

[His Lordship further referred to the facts, read the material clauses of the deed of separation, and continued:—] The sum for maintenance was therefore the clear net sum of 156*l.* a year to be paid monthly, and no doubt in 1932, nearly twenty years ago, it was regarded by both parties as a reasonable sum for the purpose. There was no clause in the agreement whereby the wife undertook not to take any proceedings in the future for maintenance. It was admitted that the husband had faithfully performed on his part all the provisions of the deed, and in particular, had paid the agreed sum of 156*l.* with complete regularity from 1932 onwards, and was doing so at the date of the hearing.

There were the usual affidavits before the judge as to the financial position of the parties, and he found that the financial position of the husband had improved since the date of the deed, and the wife's position had worsened. The wife, moreover, had become something of an invalid from spinal arthritis. The judge appears to have taken judicial notice of the fact that the cost of living had greatly increased since the date of the deed.

On December 7, 1949, Peacock & Goddard, the solicitors for the wife, wrote the following letter to the husband: "Mrs. Tulip
" has instructed us to approach you with regard to the allowance
" of 3*l.* a week which she is receiving under the deed, which was
" entered into between you many years ago. We feel sure that
" you will readily understand that in the condition of the present
" times this allowance is not adequate properly to maintain our
" client, and we think that in the circumstances you may be
" disposed to agree to increase it". On December 22, 1949, the husband replied: "I regret delay in replying to yours of the 7th
" instant. Do please remind your client that I do fully appreciate the changed conditions, particularly so in regard to the

“ very much higher rate of income tax now pertaining than was
 “ the case when the deed was entered into. In the circumstances
 “ you will of course explain to your client that as the allowance
 “ is paid ‘ free of income tax ’ it now costs me considerably more
 “ than originally—actually on the present rate of income tax the
 “ allowance costs me 5*l.* 9*s.* 1*d.* a week, plus tax at 9*s.* in the *l.*
 “ on 70*l.* being the difference between being assessed as a single
 “ man instead of as being married. So that the total cost to me
 “ of the allowance works out at over 6*l.* a week. In view of the
 “ depression in trade which is now imminent I regret I cannot
 “ agree to any departure from the terms of the deed ”. It was
 admitted that the husband had been guilty of no matrimonial
 offence in the ordinary acceptation of that term, unless, as it was
 submitted, the refusal contained in his letter of December 22,
 constituted the matrimonial offence of wilful neglect to provide
 reasonable maintenance.

It was submitted by Mr. Latey for the wife: 1. That the
 existence of the deed of separation of June 30, 1932, did not
 prevent the wife from coming to the court and making her
 application under s. 5 of the Act of 1949.

2. That the judge in his judgment had said in effect that the
 existence of the deed, together with the husband’s faithful per-
 formance of his part under it, made it impossible for him to hold
 that there had been any matrimonial offence by the husband; and
 though the judge had nowhere said that the wife was estopped
 from making her claim by the existence of the deed and the
 husband’s performance of it, nevertheless, his judgment in fact
 was made on this basis. Mr. Latey relied for this on this passage
 in the judgment (16): “ I myself have to try to find of what
 “ matrimonial misconduct in this particular case the husband has
 “ been guilty. He has faithfully carried out the terms of the
 “ deed. He has made his wife an allowance with which she was
 “ perfectly satisfied at the time. In the light of the present-day
 “ cost of living she is not satisfied with it; but can I possibly
 “ hold that this husband has been guilty of some matrimonial
 “ misconduct? I do not think that I can possibly do so. If I
 “ were to accede to the argument put forward by Mr. Latey it
 “ would not be safe for any parties to enter into an agreement.
 “ What Mr. Latey is seeking on behalf of the wife is the best of
 “ two worlds: he wants to say that the wife is at liberty to come

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TULIP " will benefit in the long run, so the maintenance remains
v. " at that fixed amount. If, on the other hand, the husband's
TULIP. " means increase, that cannot be helped. That is the amount.
Birkett, L.J. " which he agreed to pay, and which the wife agreed to accept,
" and so the matter stands "

3. That the only importance of the deed for the purposes of this appeal was its evidential value. If, for example, a wife were to apply to the court the day after a deed had been entered into, and where she had had proper independent advice, the evidential value of the deed on the question of reasonable maintenance would be overwhelming, whereas, after an interval of twenty years, it might be of little, or less, or of no value.

4. That the duty of the court is to look at all the circumstances of the case at the time the application is made, including the date and the provisions of the deed and of any requests made by the wife, and then to decide the matter solely by the test: Has the husband wilfully neglected to provide reasonable maintenance for his wife? If the court finds, after consideration of all the circumstances, that the husband has so neglected, then the matrimonial offence has been committed, and the court may make any order it deems to be just.

Mr. Temple submitted for the husband: 1. That the provisions of the Act of 1949 give the High Court the power to make the orders formerly made by the courts of summary jurisdiction and the provisions of s. 5 of the Act of 1949 only operate when a matrimonial offence has been committed. The decisions of the High Court in cases decided under the provisions of the Summary Jurisdiction Acts should be followed in cases brought under the provisions of the Act of 1949.

2. Where there is a valid subsisting agreement, acted on by both parties for twenty years, and the husband has duly paid the agreed sum for maintenance, wilful neglect to provide reasonable maintenance for the wife ought not to be found by any court merely because conditions have changed since the deed was entered into, and it is shown that the husband is in a position to pay more.

3. That, where it is shown that under an existing deed the husband has done all that he agreed to do, and is willing to continue doing so, he is excused from doing anything more and has committed no matrimonial offence, and the provisions of the Act of 1949 cannot be invoked against him.

4. That the wife ought not to be allowed to approbate and reprobate the agreement by taking advantage of all the other provisions of the agreement, and disregarding only the provision relating to maintenance and refusing to be bound thereby.

Many cases were cited to us, and, as we do not propose to refer to them all specifically, perhaps a general word may be said about them. The words of s. 5 of the Act of 1949, "wilful neglect to provide reasonable maintenance", are precisely the same as the words in s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, and decisions of the Divisional Court construing the Act of 1895, though not strictly binding on this court, are yet so weighty and so authoritative, that we feel that we ought to follow them unless any of them should seem to us to be plainly wrong. In none of the cases cited to us were the facts precisely the same as the facts before us. There had usually been some default in payment from one cause or another, though in *Matthews v. Matthews* (17) the agreement for the payment of a lump sum and instalments had been carried out.

But even where, as in the case before us, there is an agreement in existence, the terms of which have been faithfully performed by the husband, the principles on which the jurisdiction is to be exercised must be the same in all cases. I therefore refrain from a discussion of all the cases and the particular passages to which we were referred by counsel.

But I must refer in a little detail to *Morton v. Morton* (18). That was a decision of the Divisional Court consisting of Lord Merriman, P., and Hodson, J. Decided so recently as 1942 it reviews many of the cases cited to us. It seems to me to be decisive on what, after all, is the main question for our determination. The facts were that the marriage between the parties took place in 1913. The two children of the marriage were adults, one a married daughter and the other a soldier twenty-two years of age. The wife took out a summons at Merthyr Tydfil for maintenance in 1930 and it was withdrawn on the husband's agreeing to pay the wife 20s. a week for herself and 10s. a week for the son.

The agreed terms were: "In consideration of the wife's with-drawing the summons against the husband they hereby mutually agree to enter into a separation deed containing the following clauses: 1. Husband to pay wife 1l. a week and boy " 10s. a week, the first payment to be made on Saturday next.

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1951	" boy amount of dependants benefit only. 3. Husband to deliver
TULIP	" to wife her goods and furniture. 4. Wife to have custody of
v.	" boy with right of access by husband. 5. Usual clause that no
TULIP.	" proceedings be taken while terms of agreement kept. 6. Mutual
Birkett, L.J.	" dum casta clause. 7. Husband to contribute 3l. 3s. 0d. to
—	" wife's costs". The 10s. payment was stopped when the son
	started work.

The wife summoned the husband for wilful neglect to provide reasonable maintenance and the summons was dismissed in February, 1934. She sued on the written agreement at the Merthyr Tydfil county court in October, 1934, claiming 18l. 10s. 0d. as arrears of payments. The action was dismissed in January, 1935. Throughout the husband paid his wife 1l. a week. In September, 1941, the wife again summoned the husband on the ground of wilful neglect to maintain. The magistrate granted her an order for 30s. a week. The husband appealed.

In the course of his judgment Lord Merriman, P., said (19): " It is unnecessary to attempt, as other judges have consistently refused to do, to give an exhaustive definition of what is meant by ' wilful neglect to provide reasonable maintenance '. I am not satisfied that cases dealing solely with the meaning of the word ' wilful ', or cases dealing solely with the meaning of the word ' neglect ', are of very great assistance. Justices have to be satisfied affirmatively that the husband has been guilty of the subject-matter of the complaint, which involves, in the words of the statute, that he has been guilty of ' wilful neglect to provide reasonable maintenance '. The phrase must be considered as a whole, and, as I have already indicated in *Whittaker v. Whittaker* (20) in the Divisional Court, I agree with Lord Merrivale's view, expressed in *Jones v. Jones* (21), that the phrase imports some element of matrimonial misconduct".

Later Lord Merriman, P., said (22): " Now I have dealt already with the validity and with the construction of the heads of agreement on the assumption that there was a valid and enforceable agreement, and that it meant that the maintenance in respect of the son was limited, at any rate, to his attaining the age of sixteen years. After very helpful citation of the authorities by counsel on both sides, I think that that matter

(19) 111 L. J. (P.) 34.

(20) 55 T. L. R. 1070.

(21) (1929) 46 T. L. R. 33.

(22) 111 L. J. (P.) 33, 36.

" is now quite free from doubt. The existence of an agreement, which I will for the moment assume is now certain and clear, is not a bar to the jurisdiction of the magistrates, regarded either on the point whether the offence has been committed, or on the point of amount; but I think it is desirable to emphasize, as applied to the circumstances of this case, how high a value such an agreement has in guiding the justices in the exercise of their jurisdiction, which unquestionably remains notwithstanding the agreement, and I think it might be helpful to cite two passages from judgments of Lord Merrivale.

" The first was the case of *Diggins v. Diggins* (23). There was a separation agreement providing for a weekly sum by way of maintenance, and the husband, after two weeks, had made no payment at all, basing himself on the fact that the wife had, contrary to the terms of the agreement, so he alleged, molested him and that the weekly sum had therefore ceased to be payable. The maintenance, in fact, had not been paid. Of course, even if it were open to us, it would be quite absurd to doubt the propriety of the decision that the jurisdiction of the justices was not barred in those circumstances. Having alluded to the fact that the man had not paid that which he was liable to pay under the agreement, Lord Merrivale said this (24): ' Apart from the deed, the case is clear. The husband has wilfully neglected to provide reasonable maintenance for the wife. What remains is to ascertain whether the deed excludes the jurisdiction of the justices '. Then he says: ' It must not be supposed that there is an unlimited right in a wife under the amended statute, wherever she has entered into a deed, at her volition to proceed to the justices to get the terms of the deed reviewed. That would be contrary to good sense, and I do not doubt, if any case arise where a wife who has entered into a deed proceeds in disregard of it to seek something different from the justices, that she will meet with an answer which will prevent the possibility of further question. If she does not meet with it at first instance, she may meet with it here '. What the learned President was saying in the plainest possible language was: if it is shown that the deed provides for periodical payments, which have been punctually made, the evidential value of that deed, as showing that the husband has, by making the payments regularly, been providing reasonable maintenance for his wife, is extremely

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 " but the jurisdiction, as such, is not excluded "

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It is quite clear from a consideration of that case, and indeed all the cases cited to us, that the existence of a deed is no bar to the wife's application under s. 5 of the Act of 1949. Indeed, all the discussion in the cases on the evidential value of the deed would be quite irrelevant if this were not so. The real question therefore in the present appeal is whether Barnard, J., was right in saying, as I think it is quite plain that he did say from the passage which Mr. Latey cited, that because there was a deed of separation in existence providing for maintenance, and that this provision had been faithfully observed by the husband, it was impossible to say that he had been guilty of wilful neglect to provide reasonable maintenance, and that as no matrimonial offence had therefore been committed the wife's application must be dismissed.

I am of opinion that in so deciding Barnard, J., was wrong. With great respect to him, he seems to have ignored several essential matters. He seems to have decided that a sum for maintenance, agreed to in 1932, was unalterable so long as the husband continued to pay it, and was willing to go on paying it. But the real question for his determination was not that, but whether at the time the application was made to him the husband had wilfully neglected to provide reasonable maintenance. That must mean reasonable at the time of the application, in the light of all the circumstances then existing. The judge made no finding on this at all. He did say (25): " He has made his wife " an allowance with which she was perfectly satisfied at the " time. In the light of the present-day cost of living she is not " now satisfied with it ". This might seem to indicate a possible view that the sum fixed for maintenance twenty years ago was not " reasonable maintenance " in 1951. But the judge continued: " What Mr. Latey is seeking on behalf of the wife is to " get the best of two worlds: he wants to say that the wife is " at liberty to come to the court and get the amount varied. " If parties enter into an agreement, it may be that in some " circumstances the wife will benefit in the long run, but still the " maintenance remains at that fixed amount. If, on the other " hand, the husband's means increase, that cannot be helped.

"That is the amount which he agreed to pay, and which the wife agreed to accept, and so the matter stands".

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The judge made no reference to the letters of December 7 and December 22, 1949, which I have read. They are the letters relied on by the wife to show the refusal of the husband to provide reasonable maintenance to be wilful. I think that the judge never considered, or, if he did consider, never decided, the two essential elements in the wife's application: (a) whether the husband was neglecting to provide reasonable maintenance for his wife, and (b) whether his neglect was wilful; and I think it is plain why he never considered or decided these points. His judgment was based on the view that where a deed was in existence providing for maintenance, and the provision for maintenance had been faithfully observed, there could be no matrimonial offence of "wilfully neglecting to provide reasonable maintenance" however much the circumstances had changed. In a word, he said that once a sum for maintenance had been fixed by mutual agreement, and embodied in a separation agreement, it must be considered to be reasonable maintenance for all time.

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In my view, this way of deciding the application was wrong, because it amounted to saying that the wife was estopped by the deed from coming to the court and putting forward the changed circumstances, and that, if she were allowed to state the changed circumstances, it would make no difference because the terms of the deed prevented the judge from considering the changed circumstances. The agreed sum could not be varied at all. He also said (26): "If I were to accede to the argument put forward by Mr. Latey, it would not be safe for any parties to enter into an agreement".

This, I think, is plainly contrary to all the decisions hitherto made under the provisions of the Summary Jurisdiction Acts, and is in conflict with the decision of the Divisional Court in *Morton v. Morton* (27). I am of opinion that the terms of s. 5 of the Act of 1949 are wide enough to permit a wife who has entered into a deed of separation to make application to the court, as the appellant has done in this case, and to have the matter decided on the facts as they exist.

Some attention was given to two other points about which it is necessary to say a word or two. By cl. 4 of the deed the wife covenants to support herself, and to discharge her debts, and to indemnify the husband from all claims in respect of those debts.

(26) Ante, 223, 227.

(27) 111 L. J. (P.) 33.

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Her present action, in my opinion, in no way conflicts with the provisions of cl. 4 of the deed, and cannot be interpreted as a covenant not to bring proceedings in respect of the amount of maintenance set out in the deed.

With regard to the argument addressed to us that the wife was seeking to approbate and reprobate the agreement between the parties, blowing hot and cold as it was said, I do not think that there is any force in the argument on the facts of this case. Nowhere does the wife covenant not to make any application for maintenance in the future. The essence of the agreement was that the parties should live separate and apart, and none of her covenants does she seek to evade. All that she asks is that the husband's covenant as to maintenance should be reviewed in the light of present conditions. The words of Lord Atkin in *Hyman v. Hyman* (28) were: "In my view no agreement between the spouses can prevent the court from considering the question whether in the circumstances of the particular case it shall think fit to order the husband to make some reasonable payment to the wife. . . . The wife's right to future maintenance is a matter of public concern, which she cannot barter away".

I am therefore of opinion that the wife's appeal should be allowed, and that there should be a new trial on the issue whether the husband has been guilty of wilful neglect to provide reasonable maintenance for his wife. I refrain from expressing any view of the merits of the application. It may be, in such a case as this, that the court might find it difficult to exercise its jurisdiction in favour of the wife, having regard to all the circumstances of the case; but with that we are not concerned. All that I am concerned with on this appeal is to say that the jurisdiction exists, and that the existence of a deed of separation is no bar to its exercise. If the court must weigh the evidential value of the deed, as the decisions enjoin, it must be allowed to embark on the process and to consider the evidential value with all the other circumstances in the case.

HARMAN, J. I have the misfortune to find myself in disagreement with the judgment just delivered. I would dismiss this appeal, but I need hardly say that I put forward the reasons which follow with great diffidence.

I need not re-state the facts, which are not in controversy, nor refer again to the statutes, except to express my agreement with

Mr. Temple's submission that s. 5 of the Law Reform (Miscellaneous Provisions) Act, 1949, did no more than extend to the High Court a jurisdiction already exercised for half a century by courts of summary jurisdiction. Cases therefore under the Acts from 1895 onwards seem to me to be in point, and an application like the present could, subject to the limits of amount imposed on the magistrates, have been made at any time since that year.

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The question on this appeal is whether the court should, at the instance of a wife, relieve her from the obligation, imposed on her by a separation deed duly observed between her and her husband over the last twenty years, to maintain herself without making financial demands upon him beyond that for which the deed provides. Change of circumstances since the deed was made has caused it to operate hardly on the wife, from whom one cannot withhold sympathy, but more than this is required to entitle her to be relieved of her contract. At one time the courts looked askance at separation deeds (see *per* Sir George Jessel, M.R., in *Besant v. Wood* (29)), but it has long been established that they are unobjectionable, and an order for specific performance will be made in a proper case.

Moreover, it has now for some time been clear, as Lush, J., said in *Eastland v. Burchell* (30), that in cases of separation by mutual consent it is not for the jury to consider the sufficiency or otherwise of the allowance agreed to be made by the husband. He used these words (31): "Where the parties separate by mutual consent, they may make their own terms, and so long as they continue the separation those terms are binding upon both . . . and . . . no third person can claim to disturb the arrangement between them." The last words allude to the fact that the action was one by a tradesman, who had given credit to a wife, against her husband on the footing that she was in a position to pledge his credit. A similar view is expressed by Lord Mansfield in *Ozard v. Darnford* (32), where he said: ". . . if upon separation, the husband agrees to make her" (the wife) "a sufficient allowance and pays it . . . the husband is not liable".

It seems to follow that, so long as there is in force a separation deed binding on the parties and observed by each of them, the husband's obligation at common law to maintain his wife is discharged, or, rather, suspended. This is stated to be the law by

(29) (1879) 12 Ch. D. 605, 612. (31) *Ibid.* 486.
(30) (1878) 3 Q. B. D. 432. (32) 1 Selwyn's N. P. (13th ed.) 229.

C. A. Lord Merrivale, P., in *Dewe v. Dewe* (33). See also the observations of Hill, J., in *Papadopoulos v. Papadopoulos* (34).
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The cases also show that the common-law obligation revives where the contractual obligation comes to an end or is repudiated by the husband. Thus in *Diggins v. Diggins* (35) the husband had ceased to pay the agreed allowance and claimed that the default of the wife in observing the terms of the agreement justified him in so doing. In that he may have been right. If so, his contractual liability was at an end, but the court held that the wife's common-law right remained. This appears from the observations of the President already cited by my Lord. These seem to me to show that the existence of a deed does not act by way of estoppel, for if it did the wife's only right would be to enforce her rights under the deed, but is a circumstance of evidence by way of answer.

In *Dewe v. Dewe* and *Snowdon v. Snowdon* (36) the husband (in each case) had become bankrupt, and the wife, by proving in the bankruptcy, had put an end to his contractual liability. Nevertheless, it was held that the common-law right remained. A similar result was reached in *Iles v. Iles* (37), where the husband was not maintaining the wife on the ground that his contractual obligations under a deed did not oblige him to do so.

In *Matthews v. Matthews* (38), which is perhaps the strongest case, the husband had agreed to pay his wife a lump sum in consideration of which she agreed not to ask for maintenance. He was not maintaining her, though he had paid the contracted lump sum, and it was held that he could not contract out of his common-law obligation in that way. His contractual obligation had been fulfilled, but the wife was still living and in need of maintenance.

In *Morton v. Morton* (39) the only decision was that the magistrate had no right to order the husband to pay more than the sum of 1l. a week which he had agreed to pay and had paid under an agreement. The President made a number of observations obiter about the nature of the defence afforded by a separation agreement. He said that the existence of such an agreement was very strong evidence. With that I see no reason to quarrel. He did not decide that the court could override the

(33) [1928] P. 113, 120.

(34) [1930] P. 55, 68, 69.

(35) [1927] P. 88.

(36) [1928] P. 113.

(37) 47 T. L. R. 396.

(38) [1932] P. 103.

(39) 111 L. J. (P.) 33.

agreement, and it was not necessary for him to do so. Indeed, the decision, so far as it went, was to the contrary.

No case was cited to us, and I have found none, where a wife has obtained an order for maintenance by way of supplement to the sums being paid to her in compliance with an agreement.

A wife, in order to set the machinery of the section in motion, has to prove as a condition precedent wilful neglect of her husband to maintain her, and, in my judgment, she does not overcome that obstacle if all that she proves be that the husband has declined to pay her more than she contracted to accept as sufficient. If this be right, the existence of a binding deed, the terms of which have been faithfully observed, is conclusive evidence that the husband has discharged his obligations. It has been said that the words in question involve some degree of matrimonial offence, and this I accept, and I cannot see that there can, in these circumstances, have been any offence. If it be said that the agreement was made in 1932, and that circumstances have altered so that a maintenance sufficient then is insufficient now, and that the time at which the court is to inquire into the sufficiency is the time when the application is made, I still answer that the wife, who has agreed to accept this sum over the whole period of her husband's life should she so long live, ought not to be heard to say that it is now insufficient. It appears on the face of the deed that both parties contemplated that the agreement should endure for their joint lives. They must necessarily have contemplated the possibility of change in the circumstances of either or both of them, and have agreed to accept changes whether for better or for worse on each side. It would, in my judgment, be unjust that, because the bargain has turned out to be not so good as the wife may have hoped, she should be entitled to have it revised in her favour, while the husband has no similar right if his circumstances should deteriorate.

I have not overlooked the fact that in *Hyman v. Hyman* (40) the House of Lords held that a wife who had been divorced could not be barred from obtaining maintenance from the court by the provisions of a separation deed entered into before the divorce and expressed to endure for her life. The grounds for this decision, however, were, as I see it, that there had been an entire change of status since the separation deed was made and that what might be appropriate and binding on the wife so long as she remained a wife was not necessarily the right figure when she was

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a wife no longer. Moreover, there is, in s. 190 of the Judicature Act, 1925, which was the section there in question, no condition precedent necessary to be satisfied before the machinery of the law is set in motion. The House of Lords did not, in that case, overrule *Gandy v. Gandy* (41) (although Lord Shaw would have wished to do so), and that is a decision of the Court of Appeal refusing to override a separation deed in a case of judicial separation where the parties remained husband and wife. I point out, also, that *Rose v. Rose* (42) is still the law and shows that the court will hold that it is bound by the stipulations of a separation deed.

I turn now to the deed itself, which, like most separation deeds, does not consist only of a covenant by the husband to pay maintenance to the wife. She obtains from it other advantages, the right to live apart, freedom from proceedings in respect of previous matrimonial offences, the right to retain her personal chattels, and, on her intestacy, to leave her property to her next of kin. All these advantages she proposes to retain, and also the advantage of the covenant for the payment of money, but she asks the court at the same time to relieve her from the burden of cl. 4 of the deed which obliges her, out of the provision made for her, to support and maintain herself. This seems to me to be an impossible position: *qui sentit commodum, sentire debet et onus*. In my judgment, no court should make an order in favour of a wife in these circumstances without requiring that she should abandon her rights under the deed. I think, however, that the husband is entitled to object to that course where the deed has been entered into by parties on equal terms and at arm's length, and has always been observed since. Moreover, if the deed be set aside, the wife's right to live apart goes with it, and the husband can in due course sue her for desertion, and thus rid himself of his obligation to maintain her.

Lastly, cl. 4 of the deed contains a covenant by the wife to indemnify the husband against all liability on account of her support and maintenance, and I do not see what answer the wife would have to an action by the husband on this covenant for repayment of any sums which the court ordered him to pay to her beyond the covenanted sum. This would produce circuity of action, and it seems to me to be a plain indication pointing the same way as the other considerations I have mentioned and resulting in this, that, where there is an agreement providing

(41) (1882) 7 P. D. 168.

(42) (1883) 8 P. D. 98.

present maintenance which cannot be impeached and which has not been repudiated, it ought to be considered as conclusive evidence that the husband has not failed reasonably to maintain his wife.

I would, therefore, dismiss this appeal, because it seems to me that, if we send it back to the judge below and he refers it to a registrar for a report, there can be only one answer.

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Appeal allowed.

Leave to appeal to the House of Lords.

Solicitors: *Peacock & Goddard; Hyde, Mahon & Pascall.*

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Husband and wife—Divorce—Variation of settlement—Insurance policy—Policy effected for the benefit of “widow or children of the assured”—Whether policy a post-nuptial settlement and variable—Married Women’s Property Act, 1882 (45 & 46 Vict. c. 75), s. 11—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 25.

Somervell,
Denning and
Hodson, L.JJ.

A husband, some thirteen years after his marriage, caused to be issued a whole-life policy on his own life for the sum of 3,000*l.*, with profits. It was expressed to be issued under s. 11 of the Married Women’s Property Act, 1882, as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935, and to be “effected for the benefit of the widow or children or any of them of the assured in such shares and proportions and interest, and generally in such manner as the assured shall by will or deed “revocable or irrevocable appoint or may have so appointed”. Some thirteen years later the wife, having obtained a decree absolute of divorce, applied for a variation of the policy on the ground that it was a post-nuptial settlement to which s. 25 of the Matrimonial Causes Act, 1950, applied. There were no children of the marriage and since the divorce the husband had married again. He opposed the application, but Wallington, J., affirming the report of the registrar, held that the applicant, in default of appointment by the husband, had an implied beneficial interest in the fund, and that the policy was variable as a post-nuptial settlement. On appeal by the husband:—

Held, that the policy, having been taken out during the marriage and undoubtedly with the object of creating a fund from which the first wife might benefit, was a nuptial settlement within

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the meaning of s. 25 of the Matrimonial Causes Act, 1950, notwithstanding that the interest of the wife was contingent and uncertain and that the document, by the use of the word "widow", also provided for other contingencies, such as the possibility of a second marriage. The court therefore had jurisdiction under s. 25 to vary the settlement.

Quære, whether the policy could be regarded also as a settlement on the husband.

Decision of Wallington, J., [1951] W. N. 314, affirmed.

APPEAL from Wallington, J. (1).

The marriage of the parties, Sir John and Lady Lort-Williams, took place in 1923, and there were no children of the marriage. In November, 1936, the husband caused to be issued by the Caledonian Insurance Co. a whole-life policy on his own life for the sum of 3,000*l.*, with profits. The names of the persons effecting the assurance were those of two trustees. The policy was expressed to be issued for a single premium of 1,987*l.* 14*s.*, under s. 11 of the Married Women's Property Act, 1882 (2), as amended by the Law Reform (Married Women and Tortfeasors) Act, 1935, and to have been issued in exchange for an earlier policy of which the surrender value, with attached bonuses, was 1,987*l.* 14*s.*, the single premium referred to in the policy.

The policy provided that the sum assured should be paid to the trustees "as trustees of the moneys payable under this policy, "effected for the benefit of the widow or children or any of them "of the assured in such shares and proportions and interest, and "generally in such manner as the assured shall by will or deed "revocable or irrevocable appoint or may have so appointed".

In November, 1949, the wife was granted a decree nisi of divorce on the ground of the husband's adultery, and on January 16, 1950, the decree was made absolute. On November 17, 1950, the wife served notice on the respondent husband of an application under s. 25 of the Matrimonial Causes Act, 1950 (2), to be made

(1) [1951] W. N. 314.

(2) Married Women's Property Act, 1882, s. 11: "A policy of "assurance effected by any man on "his own life, and expressed to be "for the benefit of his wife, or of his "children, or of his wife and child- "ren, or any of them, or by any "woman on her own life, and "expressed to be for the benefit of "her husband, or of her children, or "of her husband and children, or any "of them, shall create a trust in

"favour of the objects therein named, "and the moneys payable under any "such policy shall not, so long as any "object of the trust remains unper- "formed, form part of the estate of "the insured, or be subject to his "or her debts".

Matrimonial Causes Act, 1950, s. 25: "The court may after pro- "nouncing a decree for divorce or for "nullity of marriage enquire into the "existence of ante-nuptial or post- "nuptial settlements made on the

on her behalf for a variation of the settlement stated to have been created by the policy. The husband had since married again, and there was a child of that second marriage.

The wife's application came before Mr. Registrar Wilkinson on March 1, 1951, and he in his report submitted that the policy was a post-nuptial settlement on the wife, conditional upon her surviving her husband, and on the children, if any, of the marriage; that there was an implied beneficial interest in default of appointment; and that the settlement was variable under the authority of s. 25 of the Act of 1950.

On appeal in objection, Wallington, J., on May 11, affirmed the findings of the registrar.

The husband now appealed.

Cross, K.C., and *W. R. K. Merrylees* for the husband. The sole question raised by the appeal is whether the court has jurisdiction to vary the terms of the policy of life assurance on the ground that it is a post-nuptial settlement under s. 25 of the Matrimonial Causes Act, 1950. This court is not concerned with the merits of any possible variation. Assuming that this policy can be regarded as a post-nuptial settlement, then it is not a settlement on the petitioner in the character of wife. The husband is making provision for his widow and children, and the petitioner cannot be his widow. If the husband died now his widow would be the woman who is now his wife. There appears to be no authority which covers the present case. In all the cases where a nuptial settlement has been varied the wife has been named. Here the husband might have named the petitioner, but he chose not to do so. He has said that the policy is for the benefit of any widow who survives him. Can it be said that this is so obviously a settlement on the petitioner that it ought to be so regarded.

[DENNING, L.J. The petitioner is the only identifiable person who is contemplated.]

The husband is not contemplating a wife but the person who may be his widow. He is not contemplating a person but an ascertained class. In *In re Browne's Policy* (3) the use of the

"parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the

"marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage".

(3) [1903] 1 Ch. 188.

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word "wife" was construed as meaning any wife living at the time of the husband's death. If a woman is named she does not have to be the widow in order to benefit: she has an immediate interest in the policy. If she dies during the lifetime of the husband her interest passes to her personal representatives as part of her estate: *Cousins v. Sun Life Assurance Society* (4). The court has no jurisdiction to ignore the condition that the wife in order to benefit must survive the husband: see *Dormer v. Ward* (5). Can it ignore the fact that she must survive as his widow? It is submitted that it cannot.

[*Simon, K.C.* (for the petitioner). It was made clear before the registrar that she could only benefit from the settlement on the death of the policy-holder.]

Joss v. Joss (6) differs entirely from this case because there there was a child of the marriage at the time of the settlement, on whom it conferred a benefit.

[SOMERVELL, L.J. I think that the test laid down by Hill, J., in *Hargreaves v. Hargreaves* (7), "because of the marriage", is a good one.]

The question is how that test is to be applied: it means because of the husband's marriage to a particular woman. This court has no power to vary a settlement unless it decides it was a settlement on the woman who was the settlor's wife at the time. It is submitted that all the petitioner had was a bare possibility if she survived as widow, and there was no appointment by the husband. She was only a contingent object of a future power. It is also submitted that the policy is not a nuptial settlement because it had not the then existing marriage in mind any more than any other marriage, but was directed to provision for the widow of the assured.

[*Melvill v. Melvill and Woodward* (8) and *Prinsep v. Prinsep* (9) also referred to.]

J. Simon, K.C., and *A. H. Ormerod*, for the petitioner, were not called on to argue.

SOMERVELL, L.J., stated the facts and, having read s. 25 of the Matrimonial Causes Act, 1950, and s. 11 of the Married Women's Property Act, 1882, continued:—The wife, the petitioner in the divorce proceedings, seeks to invoke the jurisdiction of the court under s. 25 to vary the terms of a life policy, which

(4) [1933] Ch. 126.

(5) [1901] P. 20.

(6) [1943] P. 18.

(7) [1926] P. 42.

(8) [1930] P. 159.

(9) [1929] P. 225.

was taken out during the marriage, on the husband's life. She has to establish that it was a post-nuptial settlement within s. 25, and that is the only question with which we are concerned in this appeal. It is to be noted that there is no express provision in the policy as to what is to happen in default of appointment by the assured. That might raise questions on which there might be a dispute, but that matter is not before this court. It is also clear that the parties thought, and I have no reason to think they thought wrongly, that this policy fell within the provisions of s. 11 of the Married Women's Property Act, 1882. I do not think that question really affects the issue before this court.

In *In re Browne's Policy* (10) a man effected a policy under the Act of 1882 which was expressed to be for the benefit of his wife and children. The wife died, and the man married again and had a child by his second wife. On his death it was held "that the widow and her child were entitled to participate jointly with the children of the first marriage". The question there was whether the use of the word "wife" in the policy restricted, so far as a widow was concerned, the benefit to the wife existing at that time. Kekewich, J., said: "Regarding the case apart from the language of the Married Women's Property Act, 1882, one is met by the presumption, which is rather one of common parlance and common sense than of law, though it has been recognized by legal authority, that a married man speaking of his wife intends his wife at that time, and does not contemplate one whom he may marry after her death, and the observation holds good respecting allusions by another to a given man's wife. But, in construing an instrument intended to make provision for a wife after the husband's death, this seems to lose weight, and is counterbalanced by the consideration that he in all probability intended to provide for her who survived him, and for that reason stood in need of the provision".

It is interesting to contrast that case with *Cousins v. Sun Life Assurance Society* (11), where the Court of Appeal reversed the decision of Eve, J. There "a husband effected policies of assurance on his life expressed to be for the benefit of his wife named therein under the provisions of the Married Women's Property Act, 1882", and it was held "that the wife took an immediate vested interest in the policy, which passed on her

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(10) [1903] 1 Ch. 188, 190.

(11) [1933] Ch. 126.

C. A. "death in the husband's lifetime to her personal representatives
1951 "as part of her estate".

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In the present case the wife was not named. The judge relied in part on the construction which he put on this document as *inter alia* a settlement on the husband and, therefore, on one of the parties whose marriage was the subject of a decree. Mr. Cross, for the husband, disputes that and takes three points. He submits, first, that it was not a settlement on the husband; secondly, that it was not a settlement on the wife at all; and thirdly that, if it was a settlement, it was not a nuptial settlement. I will discuss those points after I have referred to the authorities.

In *Hargreaves v. Hargreaves* (12) a settlement was made in April, 1914, on a young man (his widowed mother being a party to the settlement) of certain reversionary property of the young man, who assigned it to trustees upon trust, subject to the life interests of his mother, "to pay the income of the said property "to the settlor for life and after his death upon the usual trusts "in favour of his children or issue as he should appoint and "in default of appointment in equal shares at twenty-one or "marriage", and so on. It contained a power for the settlor to appoint by deed "to or for the benefit of any wife". He was not married at that time and, though he did marry very soon afterwards, the settlement did not in its terms contemplate a particular marriage.

Hill, J., held that this was not an ante-nuptial settlement within s. 192 of the Supreme Court of Judicature (Consolidation) Act, 1925. He said (13): "This section is dealing with ante-nuptial and post-nuptial settlements, and it refers to marriage. "It refers to it because what it is dealing with is what we "commonly know as a marriage settlement, that is, a settlement "made in contemplation of, or because of, marriage, and with "reference to the interests of married people, or their children". That was the test laid down by Hill, J.

In *Prinsep v. Prinsep* (14) Hill, J., somewhat enlarged the test which he thought the section imposed. In that case the main issue was whether the settlement was a post-nuptial one, and it was submitted that it did not come within the words "because of marriage". Hill, J., there said (15): "Is it upon "the husband in the character of husband or on the wife in the "character of wife, or upon both in the character of husband and

(12) [1926] P. 42.

(13) *Ibid.* 45.

(14) [1929] P. 225.

(15) *Ibid.* 232.

“ wife? If it is, it is a settlement on the parties within the
 “ meaning of the section. The particular form of it does not
 “ matter ”.

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In *Melvill v. Melvill and Woodward* (16) there are some observations in the judgment of this court which I will consider. It was decided that the settlement in question was a post-nuptial one within the section. Greer, L.J., thus referred to the submission which had been put forward by Sir Patrick Hastings. “ As I understand his argument it was this, “ that any settlement is a post-nuptial settlement, if it is a “ settlement during marriage by one of the parties, which gives “ some interest to either of the spouses or their offspring. That “ is a proposition which appeals to me as a fair and reasonable “ representation of what the section means. As I have said, it “ is not always wise without full consideration to say more than “ is necessary for the decision of the particular case before the “ court, and in this particular case I have no doubt whatever “ that this settlement of December 30, 1927, was a post-nuptial “ settlement ”. Romer, L.J., had some doubt whether the general proposition as advanced by Sir Patrick Hastings was right, and was more attracted by the definition, which I have read, given by Hill, J., in *Hargreaves v. Hargreaves* (17).

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I have not overlooked *Dormer v. Ward* (18), to which Mr. Cross referred. In that case there had been a decree of nullity, and some of the argument was directed to the issues which arose having regard to that. There was a covenant to pay a yearly sum and also provision for the wife in the event of her surviving her husband. Vaughan Williams, L.J., having held that although there was a decree of nullity there was power to vary the settlement, said (18): “ But there is a further objection to making an “ order in respect to this jointure rentcharge and term which “ seems to me practically fatal—that is, that the jointure and “ term could not commence till after the death of the respon- “ dent. I do not think that the court by the exercise of its “ powers under s. 5 [Matrimonial Causes Act, 1859] can vary “ the settlement by ignoring this condition. The reasons which “ I have given for holding that the court in the case of nullity “ has the power to vary the settlement by extending the connota- “ tion of the words ‘ marriage ’ and ‘ children ’ have no applica- “ tion to such a condition of the settlement. It may be that “ the court could make an order subject to the petitioner surviving

(16) [1930] P. 159, 177.
 (17) [1926] P. 42.

(18) [1901] P. 20, 35.

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" Mr. Ward to take effect after his death; but, even if the court can, I do not think they ought to do so. The court might, however, give power to renew the application". The provision, of course, was for the wife after the husband died. I do not think that that helps me as to jurisdiction.

The registrar referred to *Joss v. Joss* (19), a decision of Henn Collins, J., but I do not regard that as really adding anything in respect of the application to this case of what has been laid down in the other cases to which I have referred.

Before I come to the reasons which lead me to the conclusion that this appeal should be dismissed I will say one word about the judge's judgment. I think that he did at times seem to suggest that the position of the wife in this case was the same as if she had been named, as the wife was in *Cousins v. Sun Life Assurance Society* (20). With respect, I do not think that that would be right. But he puts the question, if I may say so with respect, accurately in this sentence: "In this particular case, however, having regard to the use of the word 'widow', would it be more accurate to say that the respondent obtained the policy not 'because of the marriage' but rather because he was married and in order that he might provide some support for any woman to whom he might be married at the time of his death?".

On the issue whether this was a settlement within the section, Mr. Cross admits that the words of the section have been given a wide meaning. He relies on the following facts: the interest of the petitioner was contingent; she had to survive Sir John; she had to survive him as his widow; and, at any rate if there were children (the position might be obscure if there were not), she might take no interest at all if he appointed the whole fund to the children. I do not think that that is sufficient to take it out of the meaning of "settlement" in this section.

The second point, that it is not a nuptial settlement, was summarized by Mr. Cross towards the end of his argument in this way, that the document has not any particular marriage in mind but is directed to the widow; that the present wife may die and a second wife may die during the husband's lifetime, and that in those circumstances it cannot be said that it is a nuptial settlement.

I do not take that view. I agree, of course, that the wife's interest under this document is contingent and uncertain, for it

(19) [1943] P. 18.

(20) [1933] Ch. 126.

is dependent on certain factors, but it seems to me that, if one considers that this document was taken out during the married life, and undoubtedly was taken out with the object of there being a fund from which the wife might benefit, subject to the exercise of the power of appointment in her favour, that is *prima facie* a nuptial settlement in respect of the marriage then existing. It does not seem to me to cease to be that because it also does something else. By using a single word, "widow", it does provide for certain other contingencies, among them the possibility of a second marriage and of the assured's leaving someone other than his then wife as his widow. But, having regard to the words of the section, and applying ordinary common sense, I do not think that a settlement ceases to be a nuptial settlement—in this case a post-nuptial settlement—because in certain contingencies the wife of a subsequent marriage, if there is one, may be the person to take. It is a short point, but that is the view I take of the application of the section to this document, and I think that the appeal should be dismissed.

As I take that view, it is, of course, unnecessary to consider whether the document could be regarded also as a settlement on the husband, though I think that there was force in Mr. Cross's contentions on that point.

DENNING, L.J. I agree. The word "settlement" in s. 25 of the Matrimonial Causes Act, 1950, is not used in the conveyancing sense: it includes any provision made by a husband for the future benefit of his wife if it proceeds on the footing of the then-existing marriage. It does not cease to be a settlement on her because the provision is not absolute but only contingent; nor does it cease to be a settlement on her because it may in its terms also be applicable for the benefit of a second wife by a subsequent marriage. I agree that the appeal should be dismissed.

HODSON, L.J. I agree. I also desire to express no opinion on the question whether the policy could be regarded as a settlement on the husband.

Appeal dismissed.

Solicitors: *J. D. Langton & Passmore; Withers & Co.*

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IGRA v. IGRA.

Pearce, J.

Husband and wife—Jactitation of marriage—Injunction refused—Declaration of validity of Berlin decree of divorce—Respondent to Berlin proceedings in England—No notification received—"Natural justice".

In 1942 a wife then resident in Berlin obtained a divorce from her husband who was living in England as a refugee from the Nazis. The husband had neither notice of the proceedings nor any hope of successfully contesting them, and it was probable that they were coloured throughout by racial bias; but by the legislation of the Control Council for Germany of 1946 it was expressly provided that no claim could be made, in an action for mitigation of hardship, for the restoration of a marriage which had been dissolved by divorce, and there was no doubt that by German law the decree was valid. It was accepted that the German court had jurisdiction in the divorce proceedings; and, although no direct evidence of them was available, it was the usual practice of the German courts to appoint in such cases a curator absentis on behalf of the respondent spouse and to advertise that appointment. The parties voluntarily resumed cohabitation in this country after the war, but later separated; and the husband subsequently went through a ceremony of marriage in America with another woman. On an undefended petition by the wife for an injunction on the ground of jactitation of marriage and in the alternative for a declaration that her marriage to the husband had been validly dissolved:—

Held (1.) that, notwithstanding the absence of service upon the husband, it had not been proved that the German decree offended against natural justice. There was a discretion in the English courts to dispense with service, and the court should be slow to brand a foreign decree as contrary to natural justice (particularly when it was made in time of war) merely because notice did not in fact reach the other party. The validity of the present decree had been confirmed by the subsequent law of Germany, and the husband had accepted and acted on that decree; and the interests of comity were not served if one country was too eager to criticize the standards of another country or too reluctant to recognize decrees which were valid by the law of the domicile.

Pemberton v. Hughes [1899] 1 Ch. 781; *Rudd v. Rudd* [1924] P. 72; *Shaw v. Attorney-General* (1870) L. R. 2 P. & M. 156; *Luccioni v. Luccioni* [1943] P. 49; *Boettcher v. Boettcher* [1949] W. N. 83; *Maher v. Maher*, ante, 342, considered.

(2.) That, although in the circumstances the wife was not entitled to the injunction, the court should make a declaration that the marriage had been validly dissolved.

Schuck v. Schuck [1950] W. N. 264; 66 (Pt. 1) T. L. R. 1179 applied.

WIFE'S undefended petition.

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The wife, who was born in Vienna, went to Berlin in 1919 and married the husband there in 1926. There was one child of the marriage born in 1931. The husband was a Pole by birth, who had gone to Berlin in 1916; and it was held that he acquired a German domicile of choice; it was not held that he had lost this acquired domicile at the date of the proceedings for divorce, referred to in this report, in 1942, although it was held that he had acquired an English domicile of choice by 1949.

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The husband was a Jew, the wife was not; and in 1938 the husband was exiled to Poland. He was able, in 1939, to come to England; and he saw his wife for a short time at Berlin airport en route. The wife remained in Germany until 1947, when she joined the husband in this country, where he had remained since his arrival.

In March, 1942, the wife obtained a decree of divorce in Berlin, which was made final in May, 1942. She had previously been approached by the Gestapo concerning such a divorce, and at that time she was living with another man. The decree was issued by the Landegericht, Berlin; and expert evidence was given in the present proceedings by Dr. Paul Abel that by s. 55 of a German matrimonial causes Act of July 6, 1938, a marriage could be dissolved if the spouses had been living apart for three years and if there were no reasonable hope that married life would be resumed. He further gave evidence that if a petitioner were represented by a lawyer, it was not necessary for him or her to appear in person at the divorce proceedings, and that by s. 77, sub-s. 4, of Ordinance No. 16 of February 20, 1946, of the Control Council in Germany: "No claim for restoration of a marriage " which has been declared void or has been annulled or dissolved " through divorce [in Germany] can be made ". That law covered (in his, the witness's opinion) cases where there had been political pressure, and although there was no law by which the holding of the Jewish faith by the respondent was itself a ground for divorce, there was reason to believe that the impossibility of maintaining a marriage between Jew and Aryan was in the mind of the German legislature when the Act of 1938 was passed.

The husband had no notice of the proceedings in Berlin, at which the wife was not present and of which the husband did not learn till after the war; but Dr. Abel said that it was a general rule of German law in such cases to appoint a curator absentis, and to advertise that appointment. The wife had instructed a

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lawyer and signed a document; but she had no knowledge of what legal steps were taken.

He further stated that s. 10 of the German Civil Code of 1896 provided that although the wife as a rule had the same domicile as her husband, she might acquire a separate domicile if her husband left her in circumstances in which she could not follow him, and that the court would accordingly have jurisdiction in such cases. It was also maintained in the German court during the Hitler régime that refugees from Germany maintained their German domicile.

The parties wrote to each other at the close of hostilities, and the husband told the wife that he did not recognize the German decree of 1942 as valid. The wife then tried to find out details of the German divorce, but her lawyer was dead, and she was unsuccessful. In 1947 the parties resumed cohabitation in this country, and lived together by consent as husband and wife; but the resumption of cohabitation was not a success, and although up to, and after, the date of the petition (February, 1951) both parties continued to have their home in London under the same roof, they had not lived together as husband and wife since 1948.

In 1950 the husband visited the United States; and after service of the petition he wrote a letter in which he stated that he was then living in America and had remarried in that country in August, 1950. That letter was before the court.

In February, 1951, the wife presented a petition for divorce in which she prayed for an injunction to restrain the husband from boasting or asserting that he was married to her, and in the alternative for a declaration that they were no longer married.

John Mortimer for the wife. The court has power to make a declaration that the German decree of dissolution was valid: *Schuck v. Schuck* (1). See also the Matrimonial Causes Rules, 1950, r. 80 (2), and R. S. C., Ord. 25, r. 5 (3). The validity of

(1) [1950] W. N. 264; 66 (Pt. 1) T. L. R. 1179.

(2) Matrimonial Causes Rules, 1950, r. 80: "Subject to the provisions of these rules and of any enactment, the Rules of the Supreme Court shall, notwithstanding the provisions of Ord. 68 thereof, apply with the necessary modifications to the practice and procedure in any cause or matter to which these rules apply".

(3) R. S. C. Ord. 25, r. 5: "No action or proceeding shall be open to objection, on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not".

that decree rests (i) on the jurisdiction of the German court, and (ii) on the question whether it was obtained contrary to the principles of natural justice.

[PEARCE, J. I am satisfied that the German court had the necessary jurisdiction.]

“ Natural justice ” in this case must be considered in relation (i) to the absence of effective notice of the proceedings, and (ii) to duress by the Gestapo. Such duress as may have been exercised was in accord with the wife’s own feelings, for she was then living with another man. The only persons who can complain of such duress or injustice are the parties themselves; the husband in fact approbated the proceedings by regarding himself as free to marry again, and the wife does not complain of duress. The proceedings were also approbated by the Control Council (Law 16, s. 77, sub-s. 4) in 1946. [He referred to *Pemberton v. Hughes* (4); *Rudd v. Rudd* (5); *Shaw v. Attorney-General* (6); *Boettcher v. Boettcher* (7).] In the present case personal service was dispensed with under the German regulations, which contained provision for the appointment of a curator (although there is no evidence in this case that the provisions were complied with).

In *Maher v. Maher* (8) Barnard, J., distinguished *Rudd v. Rudd* (5) and *Shaw v. Attorney-General* (6), which would seem to be against the wife here on the question of lack of proper notice, observing that the true basis of those decisions was lack of jurisdiction.

The English courts have power to dispense with service: Matrimonial Causes Act, 1857, s. 42 (9). [He referred to *Weighman v. Weighman* (10); *Paolantonio v. Paolantonio* (11); and Rayden on Divorce (5th ed.), p. 232.]

[PEARCE, J. Two courses may be taken by the courts in time of war: (i) to dispense with service, and (ii) to hold that there

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(4) [1899] 1 Ch. 781, 790.

(5) [1924] P. 72.

(6) (1870) L. R. 2 P. & M. 156.

(7) [1949] W. N. 83.

(8) Ante, 342.

(9) Matrimonial Causes Act, 1857,

s. 42: “ Every such petition shall be

“ served on the party to be affected

“ thereby, either within or without

“ Her Majesty’s dominions, in such

“ manner as the court shall by any

“ general or special order from time to

“ time direct; and for that purpose

“ the court shall have all the powers

“ conferred by any statute on the

“ Court of Chancery: Provided always,

“ that the said court may dispense

“ with such service altogether in case

“ it shall seem necessary or expedient

“ so to do ”.

(10) [1947] W. N. 307; 64 T. L. R.

40.

(11) [1950] W. N. 355; 66 (Pt. 2)

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can be no remedy until the war is over. Is it contrary to natural justice to dispense with service during a war?]

Although the court refused to dispense with service in *Luccioni v. Luccioni* (12), there is nevertheless a discretionary power so to do, and that power has been exercised in other cases. It cannot therefore be said that it is contrary to natural justice in all cases to dispense with service. Moreover, the wife would be a divorced woman if she returned now to Germany, and it would be invidious that she should be otherwise in this country.

[He referred also to *Knowles v. Attorney-General* (13), submitting that although Willmer, J., had refused to make a declaration under R. S. C., Ord. 25, r. 5, that case concerned legitimacy proceedings, and was to be distinguished.]

The husband did not appear, and was not represented, but he had written to the court to deny that he had held the wife out to be his wife for nearly three years before the date of the petition; that he considered the marriage dissolved; and that he had in fact married again in the United States.

PEARCE, J. In this case the wife petitioner claims an injunction on the ground of jactitation of marriage, and a declaration that her marriage to the respondent has been validly dissolved. When the petition was presented both parties were living under the same roof in England. The husband is now living in the United States of America. By his answer he says that he considers the marriage as dissolved, that he has not held out the petitioner as his wife for at least three years, and that he has now remarried.

The husband was born domiciled in Poland. In 1916 he moved to Berlin, where he acquired a domicile of choice. In 1919 the wife, who was an Austrian, went to live in Berlin. They married in 1926, and a child was born in 1931. He was a Jew, but she was not. In 1938 the husband was arrested and exiled from Germany to Poland. In March, 1939, he saw his wife for a short time at the Berlin airport when he was passing through on his way to England. The wife and child remained in Berlin.

From 1941 to 1943 she lived with another man. At the end of 1941 the Gestapo suggested to her that she should divorce her husband. That was a suggestion that she did not dare to disobey. However, as she was then living with another man, I doubt if the suggestion was very distasteful to her or if she was

(12) [1943] P. 49.

(13) Ante, 55.

under duress in bringing divorce proceedings. She instructed a lawyer and signed a document. She has no knowledge of what legal steps were taken. She did not attend the hearing. In the summer of 1942 she was informed that a divorce had been decreed.

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In December, 1945, she corresponded with the husband, who told her that he had applied for leave for her to come to England, forgave her infidelity, and told her that he did not recognize the validity of the divorce. The wife then tried to find out details of the divorce, but her lawyer was dead, and she was unsuccessful. In 1947 the wife came to England with her child, and the parties lived together. This re-union was not a success. In 1949 the husband became a naturalized British subject; in my opinion he had by then acquired an English domicile.

The evidence on German law establishes the following facts: the marriage certificate bears an endorsement that the marriage was dissolved in 1942. There is also a valid certificate showing that the file of the divorce proceedings has been destroyed and that there was a final dissolution of the marriage on March 17, 1942. It seems extremely probable that the ground of the divorce was that the spouses had been living apart for three years and there was no hope of resuming married life, which under German law entitles either party to obtain a divorce. If the wife was represented by a lawyer there was no need for her to appear. Where a respondent is not before the court a curator absentis is appointed, who usually advertises the proceedings. What, if any, steps he took in this case is not known. It appears that the husband did not know of the proceedings, nor was there any reasonable possibility of his contesting them had he known.

By s. 77 of Law No. 16 of the legislation of the Control Council for Germany, set up by the Allies, parties may bring actions to mitigate or remove hardships caused by judicial decisions relating to family rights based solely or predominantly on racial, political or religious grounds and to contest such decisions. This section was intended to meet cases where, as may well have happened in the present case, racial prejudice resulted in a party's being unfairly treated. But by sub-s. 4 it is expressly provided that no claim under the section can be made for the restoration of a marriage which has been dissolved through divorce. There is no doubt that by German law her divorce was and is valid.

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The wife cannot succeed in her claim for an injunction since, at the time when the husband is proved to have held her out as his wife, she was living with him, she believed that the divorce was invalid, and, far from objecting to his holding her out as his wife, she admits that she preferred him to do so. In *Schuck v. Schuck* (14), a case somewhat similar to this, Ormerod, J., held that, although he was unable in the particular circumstances to grant an injunction, he could grant a declaration that the marriage had been validly dissolved and was no longer subsisting, since the effect of r. 81 of the Matrimonial Causes Rules, 1947, enabled this court to do so, and it was the practice of the Ecclesiastical Courts to make such declaratory orders. With that decision I respectfully agree.

There remains the question whether I ought in this case to make the declaration. In *Pemberton v. Hughes* Lindley, M.R., said (15): "If a judgment is pronounced by a foreign court over persons within its jurisdiction in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court unless they offend against English views of substantial justice". Vaughan Williams, L.J., said (16): "The true principle seems to me to be that a judgment, whether in personam or in rem, of a superior court having jurisdiction over the person must be treated as valid till set aside either by the court itself or by some proceeding in the nature of a writ of error, unless there has been some defect in the initiation of the proceedings, or in the course of the proceedings, which would make it contrary to natural justice to treat the foreign judgment as valid, as, for instance, a case where there had been not only no service of the process, but no knowledge of it".

In this case it may be fairly argued against the wife that the husband had neither notice of the proceedings, nor any hope of successfully contesting them; and, further, that the proceedings were suggested by racial bias and were probably coloured by it throughout.

Horridge, J., in *Rudd v. Rudd* (17), held that a decree of divorce in the State of Washington was invalid where both parties had not acquired a domicile there but still retained their English domicile. He gave as a second reason for its invalidity the fact that one party had had no notice of the proceedings. That

(14) [1950] W. N. 264; 66 (Pt. 1)
T. L. R. 1179.

(16) Ibid. 796.

(17) [1924] P. 72.

(15) [1899] 1 Ch. 781, 790.

second reason was not necessary to the decision. In *Shaw v. Attorney-General* (18) Lord Penzance, in giving judgment, said that the judgment of the foreign court "has, in addition to the "want of jurisdiction, the incurable vice of being contrary to "natural justice, because the proceedings are ex parte and take "place in the absence of the party affected by them". But in *Maher v. Maher* (19) Barnard, J., in rejecting an argument that the divorce in the case before him was contrary to natural justice because one party had had no notice of the proceedings, pointed out that the true ratio decidendi of *Rudd v. Rudd* was want of jurisdiction.

In *Boettcher v. Boettcher* (20) Wallington, J., accepted the validity of a divorce decree of the Court of Indiana, although one party never received notice of the proceedings and did not in fact learn of them until after the decree had been made. He held that the requirements of the Indiana Court as to service were so similar to certain provisions for constructive service in English practice that they could not be said to be contrary to natural justice, and it was immaterial that in the particular case with which he was dealing the notice had miscarried.

Under our own Matrimonial Causes Act, 1857, s. 42, the court has a discretion to order substituted service or dispense with service. That discretion must vary according to the facts of different cases. To refuse to dispense with service may mean that an injured spouse may be temporarily or permanently deprived of his or her matrimonial relief and freedom. To dispense with service means that a respondent will probably be divorced without an opportunity of being heard. In the case of *Luccioni v. Luccioni* (21) Lord Merriman, P., in circumstances somewhat similar to this case, felt himself unable to dispense with service. The Court of Appeal not only upheld his discretion, but added that they themselves would have decided likewise. On the other hand, in *Rosling v. Rosling* (22), the judge dispensed with service in a case not wholly dissimilar to this one.

As there is a discretion in our own court to dispense with service, we should be slow to brand a foreign decree as contrary to natural justice (particularly when it was made in time of war) merely because notice did not in fact reach the applicant. In this case I have no evidence that the usual practice of appointing a curator absentis was not adopted, or that advertisement, albeit

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(18) L. R. 2 P. & M. 156, 162.

(19) Ante, 342.

(20) [1949] W. N. 83.

(21) [1943] P. 49.

(22) Unreported (see Rayden on Divorce, 5th ed., p. 232).

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ineffectual, was not used by way of substituted service. It must further be remembered that the husband himself is not complaining of want of natural justice in the decree against him, but has accepted it and acted on it by remarrying. The fact that the proceedings were suggested by the Gestapo and that the decree may well have been granted on predominantly racial grounds cannot be disregarded in determining whether the decree was contrary to natural justice. But the legislation of the Control Council, while giving a right to re-open other matters, has expressly refused a right to restore marriages that have been dissolved by divorce. No doubt it did so because it was felt that more injustice and hardship would be caused by revoking the divorces than by allowing them to stand. I have no positive proof, but only a suspicion, that the decree in this case was given on predominantly racial grounds. Even if it was, the subsequent law of Germany has confirmed its validity, and the injured party, if there has been injury, has accepted it and acted on it.

In those circumstances it would be unfortunate if this court felt bound to reject its validity, with the result that the wife would have a married status in England and an unmarried status in Germany. It has long been accepted that the court of the domicile is the proper tribunal to dissolve a marriage. Its decisions should, as far as reasonably possible, be acknowledged by other countries in the interests of comity. Different countries have different personal laws, different standards of justice and different practice. The interests of comity are not served if one country is too eager to criticize the standards of another country or too reluctant to recognize decrees that are valid by the law of the domicile.

In my view it has not been proved that this decree offends against natural justice and should therefore be considered invalid in this country. I shall make the declaration in the terms of the prayer.

Solicitor: *G. Parry Jones, The Law Society, Divorce Department.*

J. B. G.

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Divorce—Desertion—Termination—Offer by deserting spouse to resume cohabitation—No expression of repentance—No evidence of violence by deserting spouse against deserted spouse—Bona fides of offer—Refusal by deserted spouse to resume cohabitation—Maintenance.

Somervell,
Denning and
Hodson, L.JJ.

A wife, who had left the matrimonial home and brought a petition for divorce against her husband alleging cruelty, after the dismissal of her petition, and also of a cross-petition by the husband, wrote through her solicitors a letter to the husband offering to resume cohabitation, provided that both mothers-in-law stayed away from the matrimonial home. The husband, through his solicitors, refused the offer as not being bona fide since no repentance for her past conduct had been expressed by the wife. On an application by the wife for maintenance under s. 23, sub-s. 1, of the Matrimonial Causes Act, 1950, Pilcher, J., held that, notwithstanding the fact that the wife had admitted that she hated her husband, her offer to resume cohabitation was bona fide in the sense that she was willing to implement it; and that in the absence of evidence of violent conduct towards her husband the wife was under no obligation to express repentance, and was accordingly entitled to maintenance. On appeal by the husband:—

Held, that, the wife having made a bona fide offer to resume cohabitation, and not having been guilty of any matrimonial offence which would disentitle her to the right to be maintained, the husband, having refused her offer, was bound to pay her maintenance.

Per Somervell and Hodson, L.JJ. Proceedings under s. 23 of the Matrimonial Causes Act, 1950, are on the same footing as proceedings for the restitution of conjugal rights. The wife's right to separate maintenance depends on her ability to justify her living apart from her husband and not on the mere fact that she is a wife. That right, however, is not destroyed if she leaves her husband without justification, but is merely suspended, and if she offers to return and that offer is rejected by the husband, that suspension ends and the husband becomes a deserter.

Per Denning, L.J. The offer made by the wife did not turn the husband into a deserter, and at the present day she would not be granted a decree for the restitution of conjugal rights, for her motive in offering to return was not a sincere desire to re-establish a home but to get maintenance, and it would be wrong that, impelled by that motive, she should be able to make him a deserter, contrary to the real truth of the case. But a husband is bound to maintain his wife if she is ready to live under his roof, whatever her motive may be, so long as she has not been guilty of some grave fault, such as adultery or cruelty, for the husband's duty to maintain her depends on the fact that she is his wife, not on the fact that he has deserted her.

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The parties were married in 1942. In March, 1949, the wife, after many domestic quarrels, left the matrimonial home, taking with her the children of the marriage. She then filed a petition for divorce on the ground of her husband's cruelty. The husband at first put in an answer denying the cruelty, but in January, 1950, he amended his answer and cross-petitioned for divorce on the ground of his wife's cruelty.

On May 18, 1950, Mr. Commissioner Bush-James dismissed both petitions, having come to the conclusion that neither petitioner had succeeded in establishing a case of cruelty against the other. On June 7, 1950, the wife's solicitors, on her instructions, wrote to the husband's solicitors that, having regard to the decision in the divorce proceedings, "Mrs. Price feels that in the interest of the children both she and your client should make an effort to start afresh. She feels that good will and a bona fide desire by both parties to forget and forgive might save this marriage yet. . . . Our client is prepared and hereby offers to return to the matrimonial home in the spirit above mentioned", provided that both mothers-in-law stayed away from it.

On July 10 the husband's solicitors replied, indicating that they did not consider the offer to be bona fide. Their letter concluded: "Your letter contains no hint of repentance on the part of your client, and Mr. Price finds nothing in it to indicate that his wife genuinely and sincerely desires to mend what has been broken".

No further correspondence took place, and on January 8, 1951, the wife applied, by a summons under s. 23, sub-s. 1, of the Matrimonial Causes Act, 1950 (1), for an order for maintenance. The application was contested by the husband, but was granted by Pilcher, J., who held that the wife's offer was bona fide in the sense that she was willing to implement it; that, since there was no evidence of violent conduct by the deserting spouse against the deserted spouse which would justify the latter in fearing a repetition of such conduct, there was no obligation on the wife to express repentance; that therefore the husband was not justified

(1) Matrimonial Causes Act, 1950, s. 23, sub-s. 1: "Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial

separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation".

in refusing the wife's offer; and that, as he refused to permit her to resume cohabitation, he was liable to pay her maintenance.

The husband appealed, and the wife cross-appealed as to the adequacy of the award.

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Ruttle for the husband. There is no sufficient evidence on which the judge could come to the conclusion that the wife was willing to return as a wife. She avowed her hatred of the husband, and even if she were willing to return and occupy his bed it would be utterly unreasonable to hold that the husband was compelled to take her back. She was really forcing him to receive her as a housekeeper. This was not a bona fide offer to come back and resume a proper married life, but was a mere device to get maintenance.

[*Ware v. Ware* (2); *Thomas v. Thomas* (3); *Everitt v. Everitt* (4); and *Fletcher v. Fletcher* (5) referred to.]

Levene, for the wife, was not called upon to argue.

SOMERVELL, L.J., stated the facts and continued:—I think that there is only one point in this appeal. The judge, of course, had to consider whether the offer of the wife to resume cohabitation was a genuine offer, and he decided that it was. He said in his judgment: "I am well satisfied that the wife's offer was "bona fide, and the circumstances of the case were not such that "there was any obligation upon the wife to express repentance "and contrition but that, if there was, her solicitors, in the letter "to which I have referred, went quite as far as was necessary. " . . . I accordingly find that the wife in this case has made a "sufficient and bona fide offer to return, I am satisfied that she "would be willing physically to go back with her children under "her husband's roof if he would take her, and I am satisfied that "in the particular circumstances of the case he is not justified in "refusing his wife's offer to return".

Mr. Ruttle questioned whether the judge had found that the offer was an offer to return as a wife in the proper sense of the word. There can be, to my mind, no conceivable doubt about that. The judge is very familiar with these matters, and it is quite plain from his judgment that he realized that the offer had to be to return as a wife and not as a housekeeper, or in some limited sense.

(2) [1942] P. 49.

(3) (1946) 115 L. J. (P.) 75.

(4) [1949] P. 374.

(5) (1944) 61 T. L. R. 354.

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The only limitation here is with regard to the mothers-in-law. That being so, Mr. Ruttle submits that the judge's finding cannot stand. He also submits, I think, that the fact that the wife stated in her evidence before Pilcher, J., that she hated her husband was relevant in considering whether her husband was liable to maintain her on the basis that it was a genuine offer.

This was simply a question of fact: was this offer a genuine offer? Her expressions of dislike of her husband were no doubt very relevant in coming to a conclusion on that matter. But, once the judge had come to the conclusion that this was a genuine offer in the circumstances, there seems to me to be an end of the case. I say, "in the circumstances", because, as has been pointed out, there may be a case where the deserting spouse has ill-treated the deserted spouse, or the other way round, and there may be cases where a mere offer to return without the assurance of a change of habits may not be enough. The judge considered that aspect of the matter, and on the evidence he was plainly justified in coming to the conclusion which he did, and we cannot interfere with his decision. I say that because it is plain that he was very fully alive to what I may call the points against the offer being a genuine one. The wife started off by suggesting that her offer was for the children's sake; then she said that she wanted to re-establish the marriage; and finally she did admit that she was in a difficulty over money, and she decided that she would either come under her husband's roof, if he would take her, or, if he did not, would apply for maintenance. It was the financial difficulties that prompted her to make the offer to go back, and she decided to go back.

It is plain from the evidence that the judge was determined to probe the wife's evidence very carefully before he was satisfied that this offer was a genuine one. As he has done that, and as he has decided that it was a genuine offer, that to my mind is an end of this case, and the appeal should be dismissed.

DENNING, L.J. This is an application under the new jurisdiction conferred on the High Court by the Matrimonial Causes Act, 1950, whereby it can order a husband to pay maintenance to his wife if he has "wilfully neglected to provide reasonable maintenance for her". A similar jurisdiction has been exercised ever since 1895 by the justices. I do not myself think that "wilful neglect to maintain" is the same as desertion. The present case is, to my mind, a good illustration of the difference.

This wife deserted her husband and then went to the Divorce Court and charged him with cruelty. She lost her case, and immediately, through her solicitors, offered to go back to her husband. She made the offer genuinely in this sense, that she was prepared to return to her husband if he would have her; but she did not have any genuine desire to re-establish the marriage. Her motive was to get maintenance for herself. That is quite clear from the official shorthand note of the judgment, from which alone we are entitled to take the judge's findings of fact.

The judge said: "The wife undoubtedly in court made a verbal offer to return and quite clearly, in the letters which I have already read, through her solicitors expressed her willingness to return. This fact, however, is not in dispute—the wife hates her husband. She had hated him certainly for some time before she left him. She has been candid enough in that matter at any rate. She says, however, that hating him as she has for some time, and still does, she is willing to go back and live with him as his wife". Then he says: "She pretended at first in the witness-box before me that one of the reasons why she wanted to go back to her husband was for the children's sake. Well, I cannot believe that is true. She then said she wanted to try and re-establish the marriage. I do not think that was true. Finally, towards the end of her evidence, she agreed that the real position was that her financial situation was such that either she must be maintained by her husband under his roof or else paid something to maintain herself".

In my opinion the offer thus made by the wife in that state of mind did not turn the husband into a deserter. The matter can be tested by asking whether she would be granted a decree of restitution of conjugal rights. I am clear that she would not be, for the simple reason that her motive in offering to return was not a sincere desire to re-establish a home, but to get maintenance for herself; and it would be quite wrong that she, being impelled by that motive, should be able to turn the tables on her husband and make him a deserter contrary to the real truth of the case: see *Russell v. Russell* (6).

Pilcher, J., recognized the correctness of that as a moral proposition, for he referred to the argument of counsel for the husband in these words: "Counsel says that the circumstances of this case, the character of the wife, her admitted hatred of the husband and her bitterness towards him, are such that no

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(6) [1895] P. 315, 334.

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 1951 "stated, I think there is perhaps little fault to be found with
 PRICE "that proposition as a moral one". In my opinion the moral
 v. proposition is co-extensive with the legal proposition, because the
 PRICE. court nowadays—contrary to its former practice—does not grant
 Denning, L.J. a decree of restitution unless the petitioner is sincere in asking
 for it: see Rayden on Divorce (5th ed.), p. 125.

It does not follow, however, that the wife is not entitled to maintenance. The duty of a husband to maintain his wife depends on the fact that she is his wife, not on the fact that he has deserted her. He is liable to maintain her so long as she is his wife, provided that she has not been guilty of some grave fault disentitling her to maintenance. In this very case the judge, notwithstanding his severe comments on the wife's motive in offering to return, did hold that she was entitled to maintenance. The crucial passage of his judgment is in these words: "None
 "the less, the woman is still his wife. Neither of them has been
 "guilty of any matrimonial offence against the other, except that
 "the wife has walked out of the house and is thereby technically
 "in desertion. She has, however, made a bona fide offer to
 "return and, in the circumstances, I am well satisfied that in
 "law there are only two alternatives open to the husband: either
 "he must take her back and maintain her under his own roof as
 "his wife, or else he must support her under another roof". The judge had previously made it clear that by bona fide offer to return he meant only that "she was prepared to return to her
 "husband if he would have her".

I find myself in full agreement with that passage. It is, I think, the law of this country that a husband is bound to maintain his wife if she is ready to return to live under his roof, whatever her motive may be, so long as she has not been guilty of some grave fault, such as adultery or cruelty. That was the settled rule of the ecclesiastical courts. They always granted a decree of restitution—and consequently an award of maintenance—so long as the relation of husband and wife existed, and only refused it when the wife had been guilty of adultery or cruelty. Even if she had been guilty of desertion, and made an offer to return solely to get money for herself, she would be granted a decree of restitution and consequently an award of maintenance (see *Simmons v. Simmons* (7)), though the amount of it might be reduced on account of her conduct: *Manby v. Scott* (8). For many

(7) (1847) 1 Rob. Ec. 566.

(8) (1660) 2 Sm. L. C., 13th ed., 440-1.

years the Divorce Courts followed the same rule: see *Russell v. Russell* (9). Indeed, it was common practice to bring a restitution suit in order to enforce a money demand.

The courts of common law had a similar rule. They did not, of course, make an order for maintenance, but they recognized that it was the husband's duty to pay his wife an adequate allowance, whenever the parties were living separate and apart, whether by consent, or from differences of temper, or for no cause stated, so long as she had not been guilty of such grave fault as to disentitle her to be maintained by him. If he did not pay her an adequate allowance, the courts of common law authorized her to pledge his credit for necessities: see *Clifford v. Laton* (10) and *Emmott v. Norton* (11). Even if she deserted him without cause, his obligation to maintain her was only suspended. It revived if and when she elected to return, whatever her motive: see *per* Lord Reading, C.J., in *Jones v. Newtown and Llanidloes Guardians* (12).

The statute conferring this new jurisdiction on the High Court speaks of "wilful neglect" to maintain, but does not define the duty to maintain. In order to ascertain it, we have to look to the common law, which does, I think, hold that a husband is liable to maintain his wife in circumstances such as the present. I agree therefore that the appeal should be dismissed.

With regard to the cross-appeal, it is, I think, clear that in fixing the actual amount of maintenance the judge is entitled to consider the conduct of the parties. The cross-appeal should therefore also be dismissed.

HODSON, L.J. The wife claimed that the husband had wilfully neglected to provide reasonable maintenance for her and her children, and prayed that the husband should be ordered to make such payments to her and to her children as may be just. The wife had left the husband in March, 1949. She had rejected his attempts at reconciliation. She took proceedings against him, based on cruelty, which failed. He countercharged cruelty against her. That charge failed. In May, 1950, when the charges of cruelty were investigated, both allegations were found not to have been proved; both claims were dismissed. She thereupon approached her husband, through her solicitors, with a view to asking him to take her back, and he has refused that offer.

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(9) [1895] P. 315, 329-331.

(10) (1827) Mood. & M. 101, 102.

(11) (1838) 8 C. & P. 506, 511.

(12) [1920] 3 K. B. 384.

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When the matter came before Pilcher, J., on this application, the wife gave evidence in the shortest possible way, saying that she was willing to go back. She was cross-examined at considerable length to show that she intensely disliked her husband and had no real desire to go back to him at all. In his judgment Pilcher, J., said: "I am satisfied that the wife did not want to go back to live with her husband, and that, if she had had whatever the appropriate sum might be by way of allowance from him, she would much have preferred to have had that allowance than to return to him. On the other hand, after listening to her evidence, I was satisfied that she was willing to return. She may have entertained some faint hope that, if they got together again, things might be happier than they had been in the past, but she was, I think, sacrificing herself to some extent in making this offer. I find, none the less, that it was a genuine offer in the sense that she was prepared to return to her husband if he would have her. It is clear that he was not willing to have her back". I do not think that that finding of fact can be assailed in this court. The judge saw the wife; and, although he was not satisfied with many of the answers which she gave to him and many of the reasons which she first put forward about being willing to return to her husband, I think that the conclusion to which he came on the facts cannot seriously be criticized.

The law is very clearly set out in this well-known passage in the judgment of Lord Reading, C.J., in *Jones v. Newtown and Llanidloes Guardians* (13): "There is no doubt that at common law if a wife chooses wilfully and without justification to live away from her husband she cannot, so long as she continues absent, render him liable for necessities supplied to her, or for her maintenance by the union, for the reason that she has of her own free will deprived herself of the opportunity which the husband was affording her of being maintained in the home. But the relief of the husband from the obligation of maintenance continues only so long as she voluntarily remains absent. Her absence, although wrongful, does not affect the relationship of husband and wife. She is entitled after however long a period of absence to return at any time".

That passage draws attention to something which, I think, is perhaps not always clearly remembered, namely, that the husband's obligation to maintain his wife is *prima facie* complied

with by providing a home for her. A wife has no right to separate maintenance in a different home unless she can justify the fact that she is living apart from her husband. If a woman, as the wife in this case has done, leaves her husband, the right to separate maintenance is not destroyed but suspended, and as soon as she expresses her willingness to go back, if that offer is rejected, that suspension comes to an end. It seems to me to follow from that that, although the question does not directly arise, in that case, on the bare facts, as I have stated them, from that moment onwards the boot is on the other leg and the party who is approached and rejects the approach becomes a deserter, and that that is the effect of the decision of the Divisional Court in *Thomas v. Thomas* (14).

I should not have mentioned that point had not my brother Denning mentioned that proceedings for restitution of conjugal rights might differ in their result from proceedings under this section. For my part I think that the proceedings under s. 23 of the Act of 1950 are on the same footing as proceedings for restitution of conjugal rights: if a wife becomes a deserter she would not be entitled to maintenance just because she is a wife, that is to say, to separate maintenance. The question of her right to maintenance may depend on whether she is a deserter or whether she is deserted or whether there is a contract between them. I do not think that the law recognizes a sort of undefined condition where parties are living apart in conditions which may be described as of drift, or in some not very clearly defined condition in so far as rights to maintenance are concerned. It is necessary that those conditions should be clearly defined, and I think that they were clearly defined by Lord Reading, C.J., in *Jones v. Newtown and Llanidloes Guardians* (15).

If the offer was an offer in the true sense of the word, and was rejected, then in my view the judge's decision stands, and I find it a little difficult to understand Mr. Ruttle's additional argument that, even if an offer were a good one, yet the husband was not bound to have her back because, as I understood him to put it, she said she hated him and no man can be expected to have a woman back who has said that she hates him. I do not think it possible for the courts to investigate matters of emotion of that kind. She is not the first woman, I suppose, who has said she hates her husband, and a proposition of law could not

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(14) [1946] 1 All E. R. 170; 62 T. L. R. 166.

(15) [1920] 3 K. B. 384.

C. A. possibly depend on the duration of that emotion. Whatever her motives may be, she has said that she is willing to go back as a wife, and her statement to that effect has been accepted. It does not seem to me that the husband is entitled to refuse to take her back because she has made hostile statements, and, indeed, attacked him in these courts by hostile litigation.

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So far as the cross-appeal is concerned, I agree that it is a matter for discretion. The judge took the conduct of the parties into account, as I think he was entitled to do, and did not merely perform a sum in arithmetic. I see no reason to disturb the amount at which he arrived.

SOMERVELL, L.J. I agree with what has been said about the cross-appeal. On the question of the relationship between rights under this section and the right to a restitution plea, I agree with what has been said by Hodson, L.J. The appeal and cross-appeal will be dismissed.

Appeal and cross-appeal dismissed.

Solicitors: *Edwin Coe & Calder Woods; Holland & Co.*

A. W. G.

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July 11.

IN THE GOODS OF GALBRAITH.

Karminski, J.

Probate—Executors—Revocation of probate granted to executors—Grant of letters of administration de bonis non.

The court has power to revoke probate granted to executors and to make instead a grant of letters of administration de bonis non to another person.

The two surviving executors of the will and codicil of the deceased had become unable properly to carry out their duties by reason of their infirmities. Accordingly, application was made on motion to the court for probate to be revoked and for a grant to the applicant of letters of administration de bonis non.

Held, that in the special circumstances an order might be made in the terms of the motion.

In the Goods of Loveday, [1900] P. 154, applied.

PROBATE MOTION.

The deceased, Juanita Methven Galbraith, died at Haslemere on March 11, 1945, a widow with no issue, domiciled in England.

Her will, executed in 1929, with three codicils executed respectively in 1932, 1934, and 1936, annexed, was proved in the Principal Probate Registry by the two surviving executors named in the will on June 2, 1945.

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The two executors had distributed the specific legacies, but a proportion of the estate consisted of property in the Argentine. Owing to restrictions in that country on the remittance of funds to the United Kingdom the executors had been unable to pay more than 50 per cent. on account of the pecuniary legacies; the assets in the Argentine were represented by shares in certain Argentine companies, and the matter required constant attention.

Medical evidence was given by affidavit that the two executors were failing in health, and were unfit and unable to carry on the duties of executors adequately. Of the executors, one was over eighty and had become senile and mentally confused. His memory was defective, he had great difficulty in expressing himself, and he showed marked and increasing signs of arterio-sclerosis. The other was seventy-six, had been very seriously ill for a year, and suffered from arterio-sclerosis. The doctor expressed the view that his physical condition precluded extra worry, and that he was not in a fit state of health to attempt any sort of work.

Evidence was also before the court that the solicitors were unable to obtain adequate instructions from one executor, or any instructions from the other, owing to the executors' failure in health.

The court was moved to revoke the probate of the will and codicils granted to the executors and to grant letters of administration de bonis non in the estate of the deceased with the will and codicils annexed to the applicant, a great-nephew of the deceased.

All parties concerned consented to the motion. No minority or life interests were involved.

Miss Morgan Gibbon. There appears to be no precedent for such an application as this, but it is submitted that the principle in *In the Goods of Loveday* (1) is applicable. Reference may be made to Tristram and Coote's Probate Practice (19th ed.), at p. 336; and, at p. 340, it is stated in general terms that there are some other cases for revocation which do not come under the general heads previously mentioned in that chapter.

(1) [1900] P. 154, 156.

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KARMINSKI, J. I propose to make an order in the terms of the motion, namely, to revoke the probate of the will with its three codicils, which was granted to the two surviving executors named in the will, and to grant letters of administration de bonis non together with the will and codicils to the applicant, Peter Musson, a great-nephew of the deceased.

The application is a novel one only to this extent: there appears to have been no reported case in which both executors have been relieved of their duties in this way; but in the present case there is the clearest possible evidence that both the surviving executors are men of very advanced age and suffering from such a degree of physical and mental infirmity as makes a continuance of their duties impossible.

For reasons due to conditions in the Argentine the estate has not yet been wound up, and I have to consider the objects of the court in looking after the estate, in looking after the proper representation, and, not least, in looking after the interest of the parties beneficially interested. Applying the principles laid down by Sir Francis Jeune, J., in *In the Goods of Loveday* (1), I think it right to make an order in the terms of the motion.

Application granted.

Solicitors: *Birkbeck, Julius, Edwards & Coburn.*

J. B. G.

(1) [1900] P. 154, 156.

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June 14.

Lord
Merriman, P.,
and
Havers, J.

BOTTOMS v. BOTTOMS.

Husband and wife—Justices—Fresh evidence—Application to strike out non-cohabitation clause and to vary maintenance order on ground of bona fide offer to resume cohabitation—Continuance or discharge of non-cohabitation clause to be decided first—Combined application inappropriate.

Where an order containing a non-cohabitation clause is made by a court of summary jurisdiction on the ground of desertion, the court must determine whether there is fresh evidence upon which the order may be varied by striking out the non-cohabitation clause before considering whether or not there is a bona fide offer on the part of the deserting spouse to resume cohabitation; for, so long as the non-cohabitation clause stands, a wife has a complete answer to any overtures for a reconciliation.

Judgment of Hill, J., in *Timmins v. Timmins* [1919] P. 75, approved, and that of Lord Coleridge, J., *ibid.*, not followed.

APPEAL from Epping justices.

In May, 1922, an order containing a non-cohabitation clause was made by the justices on the ground that the husband had deserted the wife. There was no evidence of the grounds on which the non-cohabitation clause was originally inserted. The husband was ordered to pay the wife 15s. a week maintenance. The parties did not resume cohabitation, but there was evidence that the husband had made certain overtures for a reconciliation, the last of which was contained in a letter written in 1950. In 1951 the husband issued a summons to vary the order of 1922 by striking out the non-cohabitation clause and by making the husband no longer liable to pay maintenance. That summons was dismissed on March 20, 1951, and the husband now appealed.

There was some evidence on the part of the husband that it was hoped, if the non-cohabitation clause were deleted, that the letter which he had written in 1950 might be used as a basis for founding proceedings for divorce on the ground of desertion in due course.

John Mortimer for the husband.

M. Ahern for the wife.

LORD MERRIMAN, P. This is an appeal by a husband against the dismissal by the justices for the Epping petty sessional division of Essex, sitting at Waltham Abbey on March 20, 1951, of his summons to vary an order made as long ago as May 9, 1922. That order had been made on the ground of desertion. The variation sought was to strike out the non-cohabitation clause which had been included in the original order, and to discharge the liability under the money award which had been made in favour of the wife. That can, I suppose, technically be called a variation, but if both those branches of the application had been granted there would be nothing left of the order, and it would in fact be revoked.

Some confusion about this case has arisen from the attempt to get rid of the order in that way; and, having given the matter careful consideration, I have come to the conclusion, reluctantly, but I think inevitably, that this is a case in which the justices have never really decided the true point. They have never given their minds to the one outstanding issue. In my opinion, in a case like this, where a separation order has been in effect for nearly thirty years and the wrong-doer is trying to get rid of it,

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he has to show some substantive ground for doing so. But, by coupling it with the attempt to get rid of the money payment at the same time, he has misled himself and the justices into dealing with this case as if it were a simple issue arising in proceedings where the wife has a maintenance order on the ground of desertion and the husband is trying to end the desertion by offering to resume cohabitation.

I may say at once that I am not going into the merits, because I think that there is a substantial point on merits to be decided. There was evidence in this case that at intervals, for one reason or another, the husband had made overtures. The last of them was said to be contained in a letter written in 1950, that is to say, twenty-eight years after the order had been made on which this application was based. I will not comment on the offer beyond saying that nobody could put it forward as a very warm expression of desire for re-union with his wife, and that there was some evidence on the part of the husband that it was hoped, having got rid of the non-cohabitation clause, to use that letter not only for the purpose of then and there having the order for 15s. a week discharged, but also for founding proceedings against the wife for divorce on the ground of desertion. The justices have dismissed the whole summons solely on the ground that that was not a bona fide offer.

In my opinion the real issue in this case has been overlaid by the way in which the husband presented this summons. The real issue was this, and nothing else: should the order be varied by striking out the non-cohabitation clause? For so long as the non-cohabitation clause subsisted (always assuming, of course, as I must assume in this case, that it really was part of the order, having stood for twenty-eight years), the question of offers made to the wife to resume cohabitation is entirely beside the point. She had an order including a clause that she was no longer bound to cohabit with her husband. So long as that clause stood it had the effect, by law, of a judicial separation on the ground of cruelty, which also, as a matter of history, was by law the exact equivalent of the old divorce *a mensa et thoro* on the same ground. She had, in other words, a complete answer, so long as that clause stood, to any overtures for reconciliation, and the question whether these offers were bona fide does not arise at all so long as the non-cohabitation clause subsists.

If I felt that that matter had been considered on its merits, and not solely in relation to the bona fides or otherwise of the

letter written in 1950, I might still feel that it was possible for us to deal with this case without sending it back to the justices, but in my opinion it is impossible to say that that, which is the real issue, has ever really been determined at all. I am not going to express any opinion about the conclusion that should be reached.

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The first fact which must be considered is, what were the grounds on which the non-cohabitation clause was put into the original order. What was it that the wife was found to have suffered which necessitated a separation order? I say that must obviously be the first question because under the section by which justices are empowered to vary an order by striking out a non-cohabitation clause, they must act "upon fresh evidence", and the evidence must satisfy the court that it is proper to make the alteration. That necessarily impels an inquiry into what is said to be the change of circumstances. What has happened since the order was originally made which amounts to what I call, for short, the change of circumstances, justifying the wrong-doer in saying that it is no longer necessary to have this order for the protection of the aggrieved party?

Certain things have appeared on the face of the evidence which it may be relevant to take into consideration. I am not going to express any opinion about their weight. It has been said that at intervals the husband made overtures, and it is suggested, rightly or wrongly, that, at one stage at any rate, the wife did not reject these overtures merely because she had a separation order in her favour, but considered them on the merits. For example, it is said that she inspected a house, but did not like the house itself. Such matters may tend, on the one hand, to show that after all there was nothing so very dreadful in the husband's conduct in the past as to necessitate the continuance of this order, after a lapse of a good many years in which nothing further had occurred to disturb the wife. That is one possible point of view.

On the other hand, of course, the wife is entitled to point out, and substantiate it if she can (or call upon the husband to substantiate the opposite, if he can) that the husband's conduct has been simply designed to enable him, the wrong-doer, after the lapse of a very long time during which neither of them has shown any very ardent desire to resume cohabitation, to get this order removed so that he may then be in a position to go through the form of asking his wife to resume cohabitation, and then to

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be able to say, on her expressing a determination not to do so, that now she has deserted him. Those are among the matters which the justices will be able to take into account on the one side or the other.

But the ground on which I think that this case must be sent back is that the real issue, as such, has never been separately determined, and determined—(and this is the only direction in law that I propose to give)—with the fact very plainly in mind that it is the wrong-doer who is trying to set aside the order which was originally made for the protection of the aggrieved party, and that it is not a case in which the aggrieved party is saying, on her own part, “I do not want this order any longer”, or “I do not need it any longer for my protection, and I prefer “to take the risk of my husband saying that he will come back, “with the proviso, no doubt, that if he does not I shall sue him “for desertion”.

Plainly, when it is the wrong-doer who is seeking to set such an order aside, he must show some good cause for doing so. In other words, he must produce fresh evidence, as those words were understood in *Timmins v. Timmins* (1). The real misdirection in this case is, to my mind, shown quite plainly by the fact that the husband's counsel has been compelled to rely on the judgment in *Timmins v. Timmins* (1) of Lord Coleridge, J., which has not generally found acceptance, and to ignore the dissenting judgment of Hill, J., which has generally found acceptance, and which puts the direction which the justices should have given to themselves in this case as plainly as words can put it. They should not have treated this case simply as an ordinary desertion case, in which offers were made, as if they were put forward on their merits apart from the existence of this separation order.

I think that it is necessary for us to send the case back to the justices, setting aside the order for dismissal, for the determination of the sole issue whether this is a case in which, in the year 1951, this separation order, made in 1922, should or should not be allowed to stand.

HAVERS, J. I agree. It seems to me clear that the real question which fell to be determined in this case was never present to the minds of the justices, and that they never gave a decision upon it. It may be that they were under a misapprehension by reason of the fact that the complainant asked them by his

summons not only to strike out the non-cohabitation clause in the order but also to revoke the order for the payment of 15s. a week; and the case seems to have been presented before the justices as an application for relief in both those ways.

On a consideration of the evidence and the decision of the justices, it appears that they were trying the case as one where the wife had obtained an order for the payment of a weekly sum on the ground of desertion, and not a case where, in addition to an award on that ground, the order also embraced a further order, namely, that the wife should not be bound to cohabit with her husband. There is, of course, an essential distinction between the two classes of order.

The justices do not appear to have appreciated the legal effect of a non-cohabitation clause, and the sole question to which, apparently, they were directing their minds was whether in the circumstances of this case, if it were proved that the husband made an offer to resume cohabitation that was a bona fide offer or not.

The dissenting judgment of Hill, J., in *Timmins v. Timmins* (2) makes it plain that that is not the real issue for the justices where there has been a non-cohabitation clause in the order.

For those reasons the justices, in my view, misdirected themselves, and never directed their minds to the real issue, whether the husband has shown, by fresh evidence, good cause for setting aside the non-cohabitation clause. We have been asked whether, notwithstanding that the justices did not direct their minds to this question, and did not express any finding upon it, we could determine the matter. I for my part, think that it is quite impossible for us to do so, for neither counsel is able to tell us with any degree of certainty what were the grounds upon which the justices in 1922 thought it right and necessary to include a non-cohabitation clause in their order. In the absence of knowledge of those matters I do not see how we can possibly determine the issue whether upon fresh evidence the husband now is able to show good cause for setting aside the non-cohabitation clause.

In my view, therefore, the proper course for us to take is to set aside this order of the justices, and to send the case back for rehearing.

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LORD MERRIMAN, P. The formal order will be: Appeal allowed, order dismissing husband's summons set aside, and the summons remitted to a fresh panel of the justices for that petty sessional division for determination of the issue whether the non-cohabitation clause should be deleted.

Solicitors: *Alfred Powell, for Hensman, Jackson & Chamberlain, Northampton; Breeze & Wyles.*

J. B. G.

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FRANK v. FRANK.

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July 6.

Somervell,
Denning and
Hodson, L.JJ.

Divorce — Petition — Wife “incurably of unsound mind” — “Continuously under care and treatment” for at least five years—Detention for part of time in Scotland and part in England—Different systems of law in two countries—Break in continuity during transference—No interruption of five-year period—Decree nisi—Matrimonial Causes Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 57), ss. 2 (d), 3—Law Reform (Miscellaneous Provisions) Act, 1949 (13 & 14 Geo. 6, c. 100), s. 3—Matrimonial Causes Act, 1950 (14 & 15 Geo. 6, c. 25), s. 1, sub-ss. 1 (d), 2.

The wife of the petitioner had for upwards of five years been under care and treatment, as a person incurably of unsound mind, in mental hospitals in England and Scotland, and at the date of the petition was still detained in an English hospital. The husband's petition for divorce was opposed by the Official Solicitor, as guardian ad litem for the wife, on the grounds that the period of detention in Scotland should not be taken into account in reckoning the period of care and treatment, and that in any event the care and treatment had not been continuous by reason of short breaks during the transference of the patient from one country to the other.

Held, (1.) that s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1949, was intended to cover, and did cover, periods of detention under different systems of law in Scotland and England, which together made up a period of at least five years' continuous care and treatment; and (2.) that it would defeat the obvious intention of the Matrimonial Causes Acts, 1937 and 1950, to treat as a breach of continuity something which must necessarily happen if a transfer from one country to the other took place. The necessary period of continuous care and treatment was accordingly established and the husband was entitled to a decree.

Decision of Mr. Commissioner Bush James, K.C. [1951] W. N. 271 reversed.

APPEAL from Mr. Commissioner Bush James, K.C. (1), dismissing the husband's petition for the dissolution of his marriage

(1) [1951] W. N. 276.

on the ground that his wife was incurably of unsound mind and had for at least five years been continuously under care and treatment (2).

The parties, Eric Joseph Frank and Klotilde Frank, were married in Prague in 1938, and eventually moved to Rochdale, the husband petitioner becoming naturalized in England. Under a reception order dated October 12, 1945, the respondent wife was admitted to the County Hospital at Whittingham on October 16, 1945, and remained there continuously under care and treatment until she was discharged "not improved" on December 23, 1946. On that day she was taken under escort to Crichton Royal Mental Hospital at Dumfries, in Scotland, where she arrived on the same day and was admitted under an emergency certificate dated December 23, followed by a Sheriff's order dated December 24, 1946, under the Lunacy (Scotland) Acts. She remained at

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(2) Matrimonial Causes Act, 1937, s. 2: "The following section shall be substituted for s. 176 of the Supreme Court of Judicature (Consolidation) Act, 1925 . . . '176. A petition for divorce may be presented to the High Court . . . either by the husband or the wife on the ground that the respondent— . . . (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition . . . '."

Section 3: "For the purposes of s. 176 of the principal Act, as amended by this Act, a person of unsound mind shall be deemed to be under care and treatment—(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . . ; (b) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of such detention as aforesaid; and not otherwise."

Law Reform (Miscellaneous Provisions) Act, 1949, s. 3: "Notwithstanding anything in section three of the Matrimonial Causes Act, 1937, a person shall be deemed for the purposes of section one hundred and

"seventy-six of the Supreme Court of Judicature (Consolidation) Act, 1925, to be under care and treatment—(a) while detained in pursuance of any order or warrant for his detention or custody as a lunatic under the Lunacy (Scotland) Acts, 1857 to 1919 . . . '."

Matrimonial Causes Act, 1950, s. 1, sub-s. 1: "Subject to the provisions of the next following section, a petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent— . . . (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition . . . '."

Sub-s. 2: "For the purposes of this section a person of unsound mind shall be deemed to be under care and treatment—(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930 . . . (b) while he is detained in pursuance of any order or warrant for his detention or custody as a lunatic under the Lunacy (Scotland) Acts, 1857 to 1919; . . . (d) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930 . . . and not otherwise."

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Dumfries without leave of absence until March 25, 1948, when she was discharged "not improved" and was transferred to St. Pancras Hospital, London. On her arriving at the hospital the relieving officer made out an order of detention pending examination and certification by the medical officer. A reception order was made on March 29, and on the same day she was admitted into Banstead Hospital, where she was still detained. During the transferences there were necessarily short intervals when the respondent, although under control, was not being detained "pursuant to any order under the Lunacy and Mental Treatment Acts".

On April 27, 1951, the husband presented his petition.

Counsel instructed by the Official Solicitor, as guardian ad litem of the wife, contended that the period during which the wife had been under care and treatment in Scotland could not be counted towards the necessary five years, and also that the continuity of the care and treatment had been broken during the transference of the patient from one country to another. The Commissioner dismissed the petition, holding that during the transits from Whittingham to Dumfries, and from Dumfries to London, and also at St. Pancras Hospital, while the patient was awaiting medical examination and certification, there had been breaks in the continuity of the care and treatment, and the requirements of the statute had therefore not been complied with.

The husband appealed.

John Latey and *Rayner Blanch* for the husband. The true construction of "continuously" in s. 1, sub-s. 1 (d), of the Matrimonial Causes Act, 1950, can be determined by studying s. 1, sub-s. 2 (d), of that Act. In that sub-section the legislature expressly envisaged a period of treatment as a voluntary patient under the Mental Treatment Act, 1930 (which treatment can only take place in England), following, without interval, a period of detention under certain prescribed orders, in either Scotland, Northern Ireland, the Isle of Man or the Channel Islands. There is, however, no machinery to make any order to cover the transit of a patient between any of those countries and England. Therefore, it is submitted, the interval between the two periods of care and treatment, when the patient was not detained pursuant to any order, cannot be said to amount to a break in the continuity of the care and treatment. By analogy, when a person of unsound mind is taken from an asylum in Scotland, where he was receiving care and treatment under s. 1, sub-s. 2 (b), to a mental hospital in

England, where he receives care and treatment under s. 1, sub-s. 2 (a), and vice versa, there being no statutory machinery for removal or transfer orders from one country to another, there is not deemed to be any break in the continuity of care and treatment by reason of the intervening journey. The section contemplates periods of care and treatment in the different countries and it must have been intended that the inevitable breaks from the journeys should not be treated as breaks in the continuity of the care and treatment.

Stuart Horner for the wife. Where a respondent is discharged "not improved" from a mental hospital in England on December 23, 1946, and a fresh reception order is made in Scotland on December 24, there is a break. Again, where the respondent is discharged "not improved" in Scotland on March 25, 1948, and after transference to England is not the subject of a detention order until March 29, there is again a break. The statute requires that the respondent shall have been continuously under care and treatment, and if there is any break there cannot be continuity. In *Murray v. Murray* (3) Greene, M.R., expressed the view that the procedure must be strictly carried out. No provision is contained in the statute for covering the transfer of patients from England to Scotland or from Scotland to England. "Continuous" means exactly what it says, and it is not possible to say that here the care and treatment was continuous. Moreover there is nothing in the Matrimonial Causes Acts which says that detention partly in England and partly in Scotland is covered by those Acts.

SOMERVELL, L.J., stated the facts and continued:—Unsound mind as a ground for a divorce appeared in our law for the first time in the Matrimonial Causes Act, 1937. It was provided that a divorce could be granted on the ground that the respondent "is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition". By s. 3, "A person of unsound mind shall be deemed to be under care and treatment—(a) while he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930. . . . (b) while he is receiving treatment as a voluntary patient under the Mental Treatment Act, 1930, being treatment which follows without any interval a period of

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C. A. "such detention as aforesaid; and not otherwise". Those last
 1951 words qualify both (a) and (b). As will have been seen, the
 detention covered by that section was a detention in pursuance of
 the English Lunacy Acts.

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With regard to lunacy, Scotland has its own statutes, a matter referred to in the Law Reform (Miscellaneous Provisions) Act, 1949. [His Lordship read s. 3 and continued:] That section, by sub-s. 2 (b), brought in Scotland, Northern Ireland, the Isle of Man and the Channel Islands.

When a person of unsound mind is removed from one hospital to another in this country an order, known as a removal order, is made under the statute which is applicable to that person, who can be, as I understand, detained under it if necessary during the transit from the one hospital to the other. As between England and Scotland, in respect of the transfer of a person of unsound mind from a hospital in Scotland to a hospital in England, or vice versa (and I think we understood the same would be true in respect of a transfer from Northern Ireland, the Isle of Man or the Channel Islands), there is no order which makes detention under the Lunacy Acts operative during the journey from one to the other. The question, therefore, in this case, is whether it can be said that this respondent has been continuously under care and treatment; for, as care and treatment is defined in terms as detention under one or other system of the lunacy laws, it is said that during the journeys from England to Scotland and Scotland to England there was no detention under those Acts.

We were referred to one or two cases, which do not really assist in the solution of this problem. The case on which the commissioner relied was *Murray v. Murray* (4), which was heard before this court. There a wife, who was admittedly incurably of unsound mind, was in 1935 discharged, not recovered, from a mental hospital under s. 25 of the Lunacy Act, 1890, for the purpose of her being detained at an institution, technically a workhouse, within the meaning of that Act. There she remained. In 1939 the husband petitioned for the dissolution of his marriage, alleging the five-year period in the terms of the Act which I have read. Sir Wilfred Greene, M.R., came to the conclusion, on the facts and the law, that, owing to a failure to perform certain conditions which were required by the Act, the respondent was not being lawfully detained under the Lunacy Act at all once she had been transferred to the workhouse. He said (5): "It is impossible to say of this patient that she was

(4) [1941] P. 1.

(5) *Ibid.* 7.

“detained in pursuance of an order at any moment of time after she left the Bexley Hospital. She was not being lawfully detained under the original reception order because that specified and only applied to Bexley. She was not being lawfully detained under s. 25 because that section had not been complied with”. Observations were made about the importance of construing and applying the Lunacy Acts strictly, with which I wholly agree, but I do not think that that case really assists. It is perhaps worth mentioning that one of the results of what happened, so far as I understand that case, was that during about four years of the relevant period there were no periodical reports on the respondent, as there would have been if she had been detained under an order.

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The next case is *Crutchfield v. Crutchfield* (6), but I will first refer to the section under which the order of the relieving officer was made in the present petition when the respondent was brought back to England from Scotland and after she had arrived at St. Pancras Hospital. The Lunacy Act of 1890, by s. 20, which has been amended by a later Act but not in any respect that matters, provides that if a relieving officer (and one or two other persons named) “is satisfied that it is necessary for the public safety or the welfare of an alleged lunatic, with regard to whom it is his duty to take any proceedings under this Act, that the alleged lunatic should, before any such proceedings can be taken, be placed under care and control” then he “may remove the alleged lunatic to the workhouse”, and in substance, under the section as amended, have him or her detained, “but no person shall be so detained for more than three days”. It is an emergency power to make a three-day detention order.

The question which arose in *Crutchfield v. Crutchfield* (6) was this: there had been such an order under which the patient had been removed to a hospital. After that she was transferred to a mental hospital as a voluntary patient. The question therefore arose, under what is now s. 1, sub-s. 2 (d), of the Matrimonial Causes Act, 1950, whether her treatment as a voluntary patient followed a period during which she was detained as mentioned in para. (a), and that would be in pursuance of an order under the Lunacy and Mental Treatment Acts mentioned in s. 3 of the Matrimonial Causes Act, 1937. Jones, J., held, and I certainly accept it in that there is nothing in the conclusion which I am about to express in any way inconsistent with his decision, that an order under s. 20 was not an order under the Lunacy and

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1951 a condition of period precedent to voluntary treatment.

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The first question here, I think, is (and this is how Mr. Horner puts it) whether the proper and natural construction of these provisions leads to the conclusion that Parliament intended to cover, and did cover, detention during the period of five years if it occurred under different systems of law, orders under which now come within the scope of this legislation? I should have thought that there could be only one answer to that question, namely, that these provisions plainly contemplate that that contingency, if it arises, should be covered. It seems to me that it would be absurd to say that, where there is, as here, provision that the detention can be in Scotland and in England—just to take those two—Parliament did not intend that two and a half years in England and two and a half years in Scotland should satisfy the requirements for the five years' care and treatment.

That is the first question and, for reasons which I shall give, I think that the answer to it is really conclusive of the other question, which is whether the fact that the section uses the word "continuously", and the words "and not otherwise" at the end, makes it impossible to say that the conditions have been fulfilled if the transfers between Scotland and England involved, as they do, a gap in which the person is not detained under any order. On that point there is no direct authority, but we were referred to *Benson v. Benson* (7), the headnote to which states: "On September 29, 1933, the respondent wife was received as a "temporary patient into a mental hospital under s. 5 of the "Mental Treatment Act, 1930. On March 1, 1934, the Board of "Control directed, under s. 5, sub-s. 13, of the Act, that the "period of her treatment be extended for three months from "March 25, 1934. On May 30, 1934, she was discharged relieved "and was admitted into another mental hospital as a voluntary "patient". Though the point was not taken, I think it plain that, anyhow on the facts as presented, there was a gap in the sense that in the journey from the hospital in which she had been at Chester, in respect of which the extension order had been made, until she arrived as a voluntary patient in the hospital at Lancaster, there was a gap, and she was not under any order. It did not occur either to counsel or to the President, who tried that case, that that made any difference. Indeed, the President treated the respondent as leaving the first hospital and going without any interruption direct to the hospital at Lancaster.

The fact that the point did not occur to anybody there may be of some assistance in considering whether this is a good point or not. I do not think that it is a good point. I think that once one reaches the conclusion that Parliament must have intended that periods in England and Scotland could be added together to make up the period of five years, the solution is given to the problem raised in the present proceeding. It would, I think, be defeating the obvious intention of the statute to treat as a breach of continuity something which must necessarily happen if the, as I think, contemplated transfer between England and Scotland or Scotland and England takes place. The facts here are that the journeys were made direct. The wife was of course accompanied by a nurse, and the order made by the relieving officer when she arrived in England was, as it seems to me, made for the purpose of regularizing a detention until the medical officer had had proper time to examine the patient and sign the necessary certificate on which the reception order here is based.

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I therefore think that this appeal must be allowed, and that what happened in this case does not prevent the husband from saying that his wife has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

DENNING, L.J. I agree, and I only add a word because we are differing from the commissioner. This is the familiar contest between a literal interpretation of an Act of Parliament and a liberal or reasonable interpretation of it. I can well understand that, in view of what was said in this court in *Murray v. Murray* (8), the commissioner felt compelled to give this Act a literal interpretation, and to hold that the period of five years was broken because of the short periods while the respondent, the wife, was being transferred between different mental hospitals. I do not think, however, that we should stick to the letter of the statute when the general intention is clear. It was plainly not the intention of Parliament that the period of five years should be broken simply because of the necessary removal of a patient from one mental hospital to another. If we should hold that such an event broke the period of five years, we should be defeating the intention of Parliament. I agree that the appeal should be allowed.

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HODSON, L.J. I agree. The wife, the respondent to this appeal, is unfortunately in a mental hospital and, as Mr. Horner pointed out, every argument should be put before the court in order to ensure that her interests are upheld. I think that the commissioner appreciated the position, but it seems to me, for the reasons which my Lord has given, that he put too strict an interpretation on the word "continuously". I think it right, on the facts of this case, to find that the wife was continuously under care and treatment notwithstanding the inevitable break between the two periods of certification—the one in England and the one in Scotland. I therefore agree that the appeal should be allowed.

Appeal allowed.

Decree nisi pronounced.

Solicitors: *Capel Cure, Glynn Barton & Co.; The Official Solicitor.*

A. W. G.

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TEALE v. BURT (FORMERLY TEALE) AND BURT.

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June 25, 26.

 Denning,
 Birkett and
 Hodson, L.JJ.

Husband and wife—Divorce—Collusion—Bargain as to damages—Claim for damages notwithstanding—"Presented or prosecuted in collusion"—Application to strike out answer alleging collusion refused.

A husband, in para. 6 of his petition for a decree of divorce filed in September, 1950, alleged frequent adultery between his wife and the co-respondent and, in para. 7, cohabitation and habitual adultery between them from November, 1949, to the date of the petition, and he claimed against the co-respondent costs and a substantial sum by way of damages. By their answers, which were in similar terms, the wife and the co-respondent admitted the adultery alleged in para. 7, but alleged that the husband was guilty of collusion, and gave the following particulars of it: they alleged that the husband, when he became aware of his wife's adultery, opened negotiations with her for the disposition of the matrimonial property; that a certain sum was arrived at as appropriate to her share of it; that, nevertheless, in the course of the negotiations, an agreement was arrived at whereby the husband, in consideration of his forgoing any right to claim damages against the co-respondent in divorce proceedings, should pay to the wife less than he would have otherwise have had to pay as her share of the matrimonial property; that that agreement was carried into effect; and that

the wife's share less the price of forgoing the claim to damages was paid to her by the husband before the divorce proceedings were instituted.

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A summons by the husband for an order to strike out the paragraph in each answer (and particulars given under it) referring to collusion was dismissed by the registrar, and an application asking the court, in pursuance of the powers conferred by R. S. C. Ord. 25, r. 4, to hold that the paragraph should be struck out, as disclosing no reasonable answer to the petition, was refused. The court, however, permitted the amendment of the averment that the husband was "guilty of collusion" to read "that the petition was "presented in collusion with the respondent and the co-respondent "in that the parties by agreement have provided for the conduct "of the suit"; and the answers had to be read as if that were the introductory averment. On appeal by the husband:—

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Held, (1.) that there was a distinction between the facts alleged and the averment of collusion introducing them; (2.) that, as always in the case of arrangements made in contemplation of divorce proceedings, it was the duty of the parties and their advisers to bring the facts alleged to the notice of the judge, so that he could determine whether there was or was not collusion; (3.) that arrangements made in anticipation of divorce amounted to collusion only if one party or the other used them as a bribe, *e.g.*, if the wife were offered excessive maintenance to induce her to initiate proceedings, or the custody of the children as a bribe not to defend; (4.) that arrangements as to damages could be made if they did not tend to pervert the course of justice; (5.) that the facts alleged in the paragraph of the answers could not be struck out, but were relevant for the court's consideration; and (6.) that the court could not say that the introductory averment of collusion was plainly unarguable and therefore could not strike it out.

Decision of Willmer, J. affirmed.

APPEAL from Willmer, J.

A husband (the petitioner) alleged in para. 6 of his petition that his wife, who had owned and managed a boarding-house jointly with him, had frequently committed adultery with the co-respondent, and in para. 7 that she and the co-respondent had lived and habitually committed adultery at certain addresses from November, 1949, to the date of the petition, which was filed in September, 1950. The husband prayed for a decree of divorce, and claimed a substantial sum by way of damages against the co-respondent in addition to costs. The wife and the co-respondent by their answers, which were in similar terms, admitted the adultery alleged in para. 7; but they both alleged that the husband was guilty of collusion (*sic*) and gave certain particulars of that alleged collusion which were summarized in the judgment as follows:—

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“ The substance of the particulars in support of that allegation
“ is that on the husband’s becoming aware of the wife’s adultery
“ he opened negotiations with her for the disposition of the matri-
“ monial property. It is alleged that a certain sum was arrived
“ at as being appropriate to the wife’s share of the matrimonial
“ property. It is further alleged, however, that in the course of
“ the negotiations an agreement was eventually arrived at
“ whereby, in consideration of the husband’s forgoing any right
“ to claim damages against the co-respondent in divorce . . .
“ proceedings, he should pay to the wife less than he would
“ otherwise have had to pay as the wife’s share of the matrimonial
“ property. It is alleged that not only was that agreement made,
“ but it was carried into effect, and that the net sum so agreed
“ upon, that is to say, the wife’s share less the price of forgoing
“ the claim for damages, was in fact paid over by the husband to
“ the wife before the institution of these proceedings ”.

The husband applied by summons to the registrar for an order to strike out the paragraphs of the answers (and particulars given under those paragraphs) which referred to collusion; and on April 27, 1951, Mr. Registrar Compton Miller dismissed that summons. The husband appealed to the judge, and asked the court in pursuance of the powers conferred by R. S. C., Ord. 25, r. 4, to hold that the registrar was wrong and that the paragraphs should be struck out on the ground that they disclosed no reasonable answer to the petition.

Willmer, J., refused the application to strike out the paragraphs and the particulars under them, but gave leave to amend the introductory averment that the husband was “ guilty of “ collusion ” so as to read “ that the petition was presented in “ collusion with the respondent and the co-respondent in that “ the parties by agreement have provided for the conduct of the “ suit ”. The answers had to be read as if that were the introductory averment.

The husband appealed.

W. R. K. Merrylees for the husband. The paragraph alleging that the husband has been guilty of collusion ought to be struck out. The allegation is scandalous, since it is also an allegation of impropriety on the part of the solicitor who negotiated the agreement. The particulars show that there was no conduct which could have amounted to collusion. The agreement was not a collusive bargain, but was a bargain for the sale of a business,

one of the terms of which was a compromise of a claim for damages.

Certainly the parties and their solicitors are bound to bring the facts to the court's notice, so that the court may find collusion or no collusion. Here, however, on the facts an allegation of collusion has been made and the facts do not justify it. There is nothing to show that the wife and the co-respondent agreed not to set up any defence, or not themselves to make any charge, which they could have set up or made; and, even if they did so agree, the husband would have to allege the agreement expressly, which he has not done.

True, in *Churchward v. Churchward* (1) it was laid down that, if the initiation of a divorce suit be procured and its conduct (especially if abstention from defence be a term) provided for by agreement, this constitutes collusion, although it does not appear that any specific fact has been falsified or withheld. There the respondent had committed adultery with the co-respondent and the petitioner agreed with her to settle money on the child of the marriage and that he would take proceedings for divorce which she would not defend, and that he would pay the costs of them and not claim damages against the co-respondent. In the present case, however, the initiation of the divorce suit was not procured by agreement. The particulars in support of the allegation of collusion contain the statement that the husband opened the negotiations with the wife on "becoming aware" of her adultery. The necessary inference from that is that there must have been a time when she was committing adultery of which he was not aware. Thus, however close the rest of the facts in *Churchward v. Churchward* (1) may be to those of the present case, the "initiation" of the divorce suit in the present case cannot have been procured by agreement. There is nothing to show that, even if the first thing that he did was to open negotiations with her, he did not present his divorce petition entirely on his own initiative. Certainly, the question whether he did or did not is entirely for the court to decide: and even if the alleged facts constitute a good answer to the petition—and it is contended that they do not and ought, therefore, to be struck out—the averment of collusion, even as amended, ought to be struck out, because the facts do not justify it.

C. P. Harvey, K.C., Gordon Friend and A. Edwards, for the wife and the co-respondent, were not called on to argue.

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(1) [1895] P. 7.

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DENNING, L.J. [after stating the facts]. There is, I think, a distinction to be drawn between the facts which are alleged and the averment of collusion with which they are introduced. As for the facts, it is clear that it would be the duty of the parties and of their professional advisers to bring them to the notice of the judge trying the case so that he could determine whether there was collusion or not. That is always their duty in the case of arrangements made in contemplation of divorce proceedings. The parties often quite reasonably, in anticipation of divorce, make arrangements in respect of such matters as the future of the house and furniture, maintenance of the wife, custody of the children, or even, sometimes, as to costs. Those arrangements are not collusive so long as they do not tend to pervert the course of justice. They often have to be made as a matter of necessity. They amount to collusion only if one party or the other uses them as a bribe—for instance, if a husband promises excessive maintenance as a bribe to persuade his wife to initiate proceedings, or promises her the custody of the children as a bribe to induce her not to defend them. Likewise the parties can make arrangements as to damages, so long as they do not tend to pervert the course of justice. Parties can compromise a claim for damages in an enticement case, just as, in the old days, they could compromise an action for criminal conversation. So, also, they can compromise a claim for damages in divorce proceedings so long as the agreement does not tend to pervert the course of justice, and it is brought to the notice of, and sanctioned by, the court. These matters have to be brought before the court so that the judge can inquire whether there is collusion or not. Unless sanctioned by the court they are invalid.

Clearly, therefore, the facts alleged in these paragraphs of the answers of the wife and co-respondent are matters which must be put before the court to enable it to conclude whether there is collusion. They cannot be struck out; they are relevant for the court's consideration.

Turning now to the introductory averment, I do not agree with the contention of Mr. Merrylees, for the husband, that in any event the averment of collusion ought to be struck out because the alleged facts do not warrant it. In my judgment, if the court felt that the proper implication from the facts was that there was an agreement that the wife and co-respondent would not set up a defence which was available to them, or would not make a counter-charge which was open to them, then there would be

collusion. At this stage the court cannot say that there is no such implication to be made. Mr. Merrylees contends that such an implication would have to be pleaded expressly, and that, as it is not so pleaded, the averment of collusion ought to be struck out. That is not the proper way in which to approach the question of collusion. If facts are present from which collusion may conceivably be inferred, we ought not to strike out the introductory averment. Quite possibly, at the trial, collusion will be negatived on the ground that there was no such implication; but we cannot strike out this averment unless it is plainly unarguable; and we cannot say that it is. I would therefore dismiss the appeal.

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BIRKETT, L.J. I agree. I fully appreciate the anxiety, indeed the alarm, which arises when the word "collusion" rears its head in the conduct of proceedings in a suit for divorce, and all that I really wish to emphasize is this: the point that we are deciding in this court is confined solely to the point of pleading. We express no view whether there has or has not here been collusion in the true sense. The question being one merely of pleading, the sole question before this court is whether these paragraphs alleging collusion ought to be struck out at this stage. Willmer, J., said that they ought not to be, but gave the wife and the co-respondent liberty to amend; and the amendment was to the effect that the petition here is presented in collusion with the wife and the co-respondent, in that the parties by agreement have provided for the conduct of the suit. Mr. Harvey has read the amendment, which does no more than incorporate those words suggested by Willmer, J., and makes no addition either by way of new fact or otherwise; and I gather that, so far as concerned the amendment itself, Mr. Merrylees could find no real objection to that. He was anxious to ensure that the liberty given by Willmer, J., was not exercised in the sense of adding any new charges, facts or elements.

In my judgment, therefore, the pleading in its amended form should stand, and the judge at the trial will consider all the matters which have been raised in this court, including this question whether there should be an implication on the facts of this case. I express no opinion at all about it, and confine myself entirely to the technical and narrow point of pleading.

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In my view, therefore, as my Lord has already said, the order of Willmer, J., dismissing the application to strike out, but giving liberty to amend, should stand.

HODSON, L.J. I agree.

Appeal dismissed.

Solicitors: *Lesser & Co.; Kingsford, Dorman & Co.*

K. R. A. H.

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July 4, 5,
6, 16.

Karminski, J.

GATTY (F. A.) AND GATTY (P. V.) v. ATTORNEY-GENERAL.

Legitimacy—Validity of foreign decree of divorce—Consequential validity of subsequent marriage—Correct formalities followed by long cohabitation—Presumption or otherwise of validity of that marriage—Acquisition of domicile of choice in United States of America—Considered domicile must be in specific State.

The parents of the petitioners in a legitimacy suit went through a ceremony of marriage in Canada in 1897 shortly after the father had divorced his first wife in North Dakota after being resident there long enough to comply with the laws of that State as to jurisdiction. The petitioners were born in 1898 and 1901 respectively, and the parents (who returned to this country in 1901) lived together for nearly thirty years, until the death of the father. The domicile of origin of the father was English, and evidence was adduced on behalf of the petitioners to show that the father had acquired in 1897 a domicile of choice in North Dakota, or alternatively in the Commonwealth of Massachusetts or in the State of New York.

The validity of the marriage in 1897 was disputed on behalf of the Attorney-General; in addition to the question of fact as to the father's domicile at the material time the question was raised on behalf of the surviving petitioner whether a marriage valid on the face of it, and with the formalities of the ceremony followed by a long period of cohabitation, was such strong *prima facie* evidence of a valid marriage as to shift the burden of proof.

Held, that the burden of proving the validity of the marriage remained upon the petitioner in view of the former marriage, notwithstanding the correctness of the formalities and the length of cohabitation.

MacDarmid v. Attorney-General [1950] P. 218 applied; *Russell v. Attorney-General* [1949] P. 391 distinguished.

The decision of the Supreme Court of Canada in *Trottier v. Rajotte* [1940] 1 D. L. R. 433, in which it was held that "...

"Since each State of the United States of America is a separate jurisdiction from the viewpoint of private international law, a person alleging the acquisition of a domicile of choice in a particular State must prove an actual residence in such State with a fixed settled determination of making his permanent residence therein. Proof of residence and of an animus manendi in the United States generally, without reference to any particular State, is insufficient . . .", cited with approval.

Held, further, that it was not established on the evidence that the petitioners' father had acquired a domicile of choice in North Dakota, Massachusetts, or New York, and that since the North Dakota divorce could not therefore be recognized, the petition must be dismissed.

LEGITIMACY PETITION.

The petitioners' father, F. A. Gatty, was married in 1885 in Quebec to one M. L. Baker. His domicile of origin was English, and he had left England some two years previously. He subsequently returned to this country; but in April, 1897, he settled down for a period of some nine months in Fargo, North Dakota, and on December 17, 1897, the District Court of Fargo, in an action by him for divorce instituted in July, 1897, on the ground of his wife's desertion, held (a) that he had been at the commencement of the action a resident of the city in good faith for more than ninety days next preceding the date of the action, (b) that as a conclusion of law it had jurisdiction of the parties and the subject-matter of the action, (c) that the wife had been guilty of wilful desertion of the plaintiff for over one year next preceding the action; and a final judgment was entered dissolving the marriage. Mrs. M. L. Gatty died in 1919.

On December 20, 1897, F. A. Gatty married one Frances Irwin in Winnipeg, Canada; they lived together until his death in 1927, having returned to England in 1900 owing to the health of their first child. Earlier in 1900 they lived in New York, but F. A. Gatty had retained certain interests in Fargo, including a banking account and the storage of some furniture. That bank account was finally closed in 1914. Mrs. Frances Gatty died in 1948. There were two children of the union, the petitioners in this suit, born in December, 1898, and August, 1901, the elder of whom died in June, 1951. In November, 1921, F. A. Gatty and Mrs. Frances Gatty went through a second ceremony of marriage at a register office in London, being described in the certificate as previously married in Winnipeg.

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In January, 1950, a petition was presented in which the petitioners alleged that their father was domiciled in 1897 in North Dakota, or alternatively (by amendment at the hearing) in the Commonwealth of Massachusetts, or in the State of New York, and that he subsequently reverted to his domicile of origin in this country.

A question arose after the death of F. A. Gatty, in regard to the payment of certain legacy duties, whether the two sons were legitimate or not; and a claim by the estate duty office remained outstanding, which rendered the presentation of this petition necessary. The petition referred also to the former marriage and its alleged dissolution as well as to the ceremony between the petitioners' parents.

The case is reported solely on the question of the presumption or otherwise as to the validity of the second marriage and on the question whether a domicile could be acquired in the "United States of America".

William Latey, K.C., and *Frank Whitworth* for the petitioner. The principle is well established that on proof of a marriage having been duly solemnized, followed by long cohabitation of the spouses, there must be cogent evidence to invalidate such marriages: *Lauderdale Peerage Case* (1); *Russell v. Attorney-General* (2). Further, in my submission, it is for those who seek to invalidate such marriage to satisfy the court beyond reasonable doubt by cogent evidence that the marriage was invalid. It was out of respect for the court that the facts of the deceased father's former marriage and the North Dakota judgment dissolving it were pleaded; but the onus of proving that that judgment is invalid in English law falls on the Attorney-General. It is for him to prove, after a lapse of half a century, that the deceased father did not acquire a domicile of choice in North Dakota when he commenced the divorce proceedings against his first wife. In my submission it is clear, from such material as it has been possible to collect, that he deliberately acquired a domicile of choice in North Dakota in 1897, and indeed stayed there for five months longer than was necessary to establish the jurisdiction of that court. In the case of a judgment of divorce granted in the State of Florida to a serving British R.A.F. officer stationed there for a time during the war Ormerod, J., held that this officer had acquired a domicile of choice in Florida sufficient to validate the

(1) (1885) 10 App. Cas. 692.

(2) [1949] P. 391.

divorce pronounced in that State: *Donaldson v. Donaldson* (3). Langton, J., observed in *Gulbenkian v. Gulbenkian* (4) that a man must have an intention to live in another country unlimited in period but not irrevocable in character.

There were many cases showing that quite short periods of residence sufficed, if the court were satisfied of the intention: see *Vardy v. Smith* (5); *Bater v. Bater* (6); *In re Drexel* (7). The last-mentioned case also illustrates the principle that the motive for acquiring a change of domicile does not negative such a change if the intention is formed; the motive there was to obtain a divorce according to French law, the spouse having acquired a domicile, in fact temporary, in France.

In view of the submission on behalf of the Attorney-General that the deceased father had not in fact become domiciled in North Dakota, I submit that on the evidence the deceased had prior to the proceedings in that State resided for considerable periods in Massachusetts and New York State, the courts of either of which States would have recognized the North Dakota decree, according to the expert evidence of Mr. Lucius Crane.

But in my submission it is enough to prove that the deceased formed the intention to acquire a domicile of choice in the sovereign State of the United States of America. There is no English decision to the contrary, and in some of the leading cases on domicile the expression "American domicile" is used by the judges without reference to any particular State. In certain similar cases on domicile in the Union of South Africa one finds judicial references to domicile in "South Africa" and not to the particular province, such as the Cape or Natal. Having formed the intention of settling in the United States, the deceased father in English law must be deemed to have become domiciled there a few months after his arrival; and though he actually chose residence in North Dakota in order to qualify for a State jurisdiction in divorce, for over a year before his return to England he resided with his wife in New York. In *Trottier v. Rajotte* (8) the Canadian Chief Justice, Sir Lyman Duff, took it for granted that no domicile of choice can be acquired in the United States as a whole: virtually he begged the question.

Finally I must pray in aid public policy against not invalidating a marriage solemnized in due form many years ago, as a result

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(3) [1949] P. 363.

(6) [1906] P. 209.

(4) (1937) 158 L. T. 46, 50.

(7) [1916] 1 Ch. 251, 259.

(5) (1931) 48 T. L. R. 661.

(8) [1940] 1 D. L. R. 434.

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of which children were born, and against their legitimacy being impeached years after the deaths of their parents: see *Apt v. Apt* (9), *per* Cohen, L.J.

Whitworth following. The onus of proof is not founded on the form of the pleadings, and on questions of status like the present the onus falls on those who seek to prove that a marriage is invalid. The North Dakota decree of divorce must be presumed to be valid unless it is proved invalid, and the onus of such proof falls on the Attorney-General. We have produced such scanty evidence as is available, and it is for the Attorney-General to produce positive evidence filling in the gaps, which he has not done: see *Spurgeon v. Spurgeon* (10); *Tweney v. Tweney* (11); and *Haviland v. Mortiboy* (12).

It is for the Attorney-General to defeat the presumption of law in favour of this marriage, regular in form and content. There can be no speculation as to what the deceased's domicile may have been. The court, in my submission, should say that the deceased, having taken counsel's advice, deliberately acquired a domicile of choice in one or other of the States of the United States of America.

Colin Duncan for the Attorney-General. If the court is seised of the fact of a previous marriage any presumption of the validity of a subsequent ceremony of marriage does not arise. *Russell v. Attorney-General* (13), where Barnard, J., held that there was nothing decisive to rebut the validity of the ceremony, is to be distinguished as there was no earlier marriage. As to the onus of proof, I rely on *MacDarmaid v. Attorney-General* (14), in which Hodson, J., said: "Once the fact of the previous marriage is proved, the petitioner must at least prove facts from which the cessation of the first marriage can properly be inferred before she can succeed".

The onus of proof is on the person who sets up a change of domicile of origin to prove it: see *Winans v. Attorney-General* (15) and *Le Mesurier v. Le Mesurier* (16). It must be proved that the deceased had a fixed determination to settle in North Dakota; but the evidence showed that he had no intention of so doing. In *Wahl v. Attorney-General* (17) it was held that there was no domicile in the United Kingdom; it had to be in

(9) [1948] P. 83, 87.

(10) (1930) 46 T. L. R. 396.

(11) [1946] P. 180.

(12) (1859) 32 L. T. (o.s.) 343.

(13) [1949] P. 391.

(14) [1950] P. 218, 220.

(15) [1904] A. C. 287.

(16) [1895] A. C. 517.

(17) (1932) 147 L. T. 382.

England or Scotland. Similarly, it was impossible to acquire a domicile in the United States of America as a whole, as instanced by Sir Lyman Duff, C.J., in the Canadian case of *Trottier v. Rajotte* (18).

Mr. Latey's statement that a man's motive for changing his domicile does not affect the question is right, but if there is only a colourable pretence this must affect a judge's decision whether in fact a man formed the intention to abandon his domicile of origin and acquire a domicile of choice. There was clearly no intention by the deceased to make North Dakota his permanent home, nor any other State the courts of which have recognized the validity of the North Dakota decree.

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KARMINSKI, J. This is a petition by Frederick Alfred Gatty and Philip Vincent Gatty for a declaration of legitimacy under the Legitimacy Declaration Act, 1858, as amended by ss. 188 and 226 of the Supreme Court of Judicature (Consolidation) Act, 1925 (19).

The first petitioner, Frederick Alfred Gatty, died in the course of these proceedings, and the petition is pursued by the surviving petitioner, his brother, Philip Vincent Gatty. The case is not in fact or in law in any way changed by the death of Frederick Alfred Gatty during the proceedings.

The petition alleges that on December 27, 1897, the father of the petitioners, the late Frederick Alfred Gatty, was married to Miss Frances Minnie Woolfield Irwin, then a spinster. It is also alleged that in December, 1897, F. A. Gatty was a British subject then domiciled in the State of North Dakota, one of the United States of America, or, alternatively, in the Commonwealth of Massachusetts or in the State of New York. As the petition originally stood, the domicile in the State of North Dakota was alone alleged, but subsequently Mr. William Latey, for the petitioner, asked leave to amend, which I granted, to add, in the alternative, domicile in the Commonwealth of Massachusetts or the State of New York.

The petition further alleges that thereafter F. A. Gatty, having reverted to his English domicile of origin, died in England in October, 1927. The petition goes on to allege that there was lawful issue of the marriage two children, namely, the petitioners, who were born respectively in December, 1898, in New York, and

(18) [1940] 1 D. L. R. 494.

(19) See now s. 17 of the Matrimonial Causes Act, 1950.

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in August, 1901, in London; and that a subsequent marriage took place in November, 1921, at a register office in London between the petitioners' parents. The petition also, and I think very rightly, alleges some of the intervening material history. F. A. Gatty was first married to a Miss Margaret Lavinia Baker in November, 1885, at Quebec. There was a child of that marriage, but that child died, aged six years. Differences having arisen between Mr. Gatty, senior, and Mrs. Margaret Gatty, proceedings were instituted in the District Court of Fargo, in the State of North Dakota, whereby F. A. Gatty prayed for a dissolution of his marriage to Mrs. Margaret Gatty on the ground of her desertion. In that suit the court of North Dakota held that F. A. Gatty had been, at the commencement of that action, a resident of the city in good faith for more than ninety days next preceding the date of the action, and that his wife had been guilty of desertion; and the marriage was dissolved. Mrs. Margaret Gatty died in the year 1919, and was, therefore, alive at the time of the marriage between F. A. Gatty and Miss Frances Irwin in the year 1897.

The Attorney-General, by his answer, did not admit that the petitioners, or either of them, were the sons of F. A. Gatty, and further did not admit that F. A. Gatty was lawfully married to Miss Frances Irwin as alleged, or at all. I should say at once that the issue of paternity was not pursued, and therefore the matter comes before the court in this way, that however the question of legitimacy has to be decided there is no doubt that physically F. A. Gatty was the father of both the petitioners, and that Miss Frances Irwin (Mrs. Frances Gatty) was their mother.

The matters with which the court has to deal in this case cover a period of time the most recent of which is fifty years old. Almost inevitably, practically all the material witnesses have died. F. A. Gatty died in 1927; Mrs. Frances Gatty died as recently as 1948; and therefore I am left with a large number of blanks in the history of the matter, though fortunately some relevant documents have survived. Almost every document, including some proofs and statements, which might have any bearing on the facts of this case has been admitted in evidence, and Mr. Colin Duncan, for the Attorney-General, took no objection to my reading and receiving certain statements which might not, on the face of them, be admissible as evidence; for the Attorney-General took the view, which I say at once that I share, that in an inquiry of this kind the strict rules of evidence can and should be somewhat relaxed; and I am satisfied that every piece of information which could be got together has come

before me. In the result, however, it is sometimes difficult to assess the value, as opposed to the admissibility, of evidence of that kind, for those who make statements and die before they can give the evidence are not subject to cross-examination, and, therefore, the value and the reliability of their evidence becomes more difficult to assess. I have approached the matter in this way, namely, that while I have received a great deal of evidence of this kind I must warn myself that, without any reflection on the good faith or credibility of those making them, it is not perhaps wise or right to accept all the statements before me as wholly reliable.

[His Lordship then considered the evidence in detail and continued:] It was common ground that the parties had decided by December, 1897, not to live in England. Their future at that time, however, was extremely obscure, and it was not clear what they were going to do in "America". "America" was used in a geographical sense, that is, the United States, and Canada; and the issue was complicated by a reference to the United States of Mexico, although it did not appear that the petitioners' parents had gone there. The issue was of importance, for I am unable to determine whether the United States, or Canada, or Mexico, was meant by "America", the emphasis then being on no return to England. In March, 1900, however, the petitioners' parents in fact returned to this country, where they eventually settled. I do not come to any conclusion merely because the parents went through the further ceremony of marriage in 1921 that they were doubtful about the validity of the Winnipeg marriage. I think that they both desired to have an easily proved English marriage in case of the death of one or the other.

It is, I think, fair, and I hope not irrelevant, to say this: that whatever conclusion I have to come to about the validity of the Winnipeg marriage, I have no doubt at all that the period of cohabitation, to use a neutral term, which lasted almost exactly thirty years between F. A. Gatty and Mrs. Frances Gatty was a happy one, and one which both regarded as in every sense of those words a matrimonial cohabitation. But I cannot, in deciding this matter, deal with it upon sentimental grounds. It was argued by Mr. William Latey and by Mr. Whitworth who followed him, for the petitioners, that when you have a marriage valid on the face of it with the formalities followed by a long period of cohabitation, that is such strong

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prima facie evidence of a valid marriage as to shift disproof of it to those who contest it. If in this case the matter had rested on the certificate of marriage at Winnipeg, followed by thirty years of open cohabitation as man and wife, no doubt there would be very great substance in that proposition, but in introducing the matter, and indeed in arguing it, Mr. Latey, with his invariable candour, pointed out that the matter did not rest there because there is no doubt whatsoever in this case that the Quebec marriage of 1885 was a valid one, that the wife to whom F. A. Gatty was married was alive at the time of the second marriage in Winnipeg in 1897, and that the real question for this court to consider is whether or not the North Dakota decree purporting to dissolve the marriage between F. A. Gatty and Mrs. Margaret Gatty was one which can be recognized as valid by the courts of this country. So far as the burden of proof is concerned, in my view on the facts of this case the burden of proof is on the petitioner to prove it, and he does not escape by proving the marriage good as to formalities and period of cohabitation if there are other matters which point to its invalidity.

My attention was drawn in the course of the argument to a large number of authorities on this point. I think it is sufficient if I refer to two quite recent cases.

In *Russell v. Attorney-General* (20) a question arose as to the validity of a marriage between the petitioner's parents, who had gone through a ceremony of marriage in a Roman Catholic church and lived thereafter together as husband and wife for many years and had issue nine children; but there was some doubt whether the full twenty-one days' notice had been given to the registrar before the ceremony, and there was evidence that the registrar himself had considered the marriage to have been invalid. In the result, the wife was refused a widow's pension by the Minister of Health, although there was no documentary evidence that the twenty-one days had not elapsed; and it was held that in the absence of decisive evidence to the contrary the validity of the marriage should be presumed. In that case, Barnard, J., in giving judgment, said this (21): "It is clear from "the authorities which have been cited to me that where there is "evidence of a ceremony of marriage having been performed, "followed by a cohabitation of the parties, the validity of the "marriage will be presumed, in the absence of decisive evidence "to the contrary. It would be both tragic and chaotic if such a

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“ceremony could, on slender evidence, be declared null and void.
 “On the evidence before me I am satisfied that the presumption
 “ought to prevail. There is no decisive evidence before me to
 “the contrary; there is only the evidence that the registrar
 “seemed to think it was an invalid marriage and that he acted
 “accordingly, and that much later on, the Ministry of Health—
 “no doubt with a proper desire to safeguard public money—was
 “not satisfied on the death of the petitioner’s father as to the
 “validity of the marriage and refused to grant the widow a
 “pension. But, as I say, I am satisfied that the presumption of
 “law should prevail and that there is no cogent evidence here to
 “rebut it”. Barnard, J., made a declaration accordingly.

The other side of the picture was illustrated in *MacDarmaid v. Attorney-General* (22). That was a case where the petitioner claimed that her parents had lawfully married in 1925, and that she had become legitimated by the Legitimacy Act of 1926. She was born in 1894, her father having first married another woman in 1886. There was evidence that there were some difficulties between her father and his first wife, who was last seen at a roller-skating rink in 1891, three years before the petitioner’s birth, when the first wife would have been twenty-seven years of age. In a considered judgment, Hodson, J., said (23): “It is
 “argued for the petitioner that no onus is cast on her by s. 1, sub-
 “s. 2, of the Legitimacy Act, 1926, to prove that her father’s first
 “wife was dead, and that, as the matter is left in doubt by the
 “evidence, the petitioner is accordingly entitled to succeed. On
 “behalf of the Attorney-General, on the other hand, it is argued
 “that sub-s. 1 does not come into operation in the case of a
 “person whose father was married to a third person before the
 “date of her birth unless there is evidence upon which, despite
 “the marriage, a declaration of legitimacy can be made. In
 “these circumstances, it is contended that the onus is on the
 “petitioner to prove that the death of the first wife occurred on
 “or before March 14, 1894, or to prove circumstances or facts
 “which the court should accept as prima facie evidence that that
 “death occurred. In my judgment, the proposition contended
 “for by the Attorney-General is correct, and, once the fact of the
 “previous marriage is proved, the petitioner must at least prove
 “facts from which the cessation of the first marriage can
 “properly be inferred before she can succeed”.

(22) [1950] P. 218.

(23) *Ibid.* 220.

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In my view, that is the test to be followed in this case. In other words, was F. A. Gatty free in December, 1897, to contract a valid marriage with Miss Frances Irwin? That question clearly depends for its answer on whether or not the decree of dissolution by the court of North Dakota is a decree which can be recognized as valid in this country, and that in turn depends on this question: was, or was not, F. A. Gatty domiciled in that State of North Dakota at the time of the institution of the proceedings there, namely, in July, 1897?

I have stated in my summary of the facts that it is common ground that F. A. Gatty's domicile of origin was English. It has, therefore, to be shown that in July, 1897, he had acquired a domicile of choice, either in North Dakota or in the Commonwealth of Massachusetts or in the State of New York, or, as Mr. Latey was disposed to argue, in any State of the United States. The burden on him who asserts a change of domicile from a domicile of origin to a domicile of choice is a heavy one. It has been said that the domicile of origin continues unless a fixed and settled intention to abandon the first domicile and to acquire another in its place is clearly shown, and in the absence of that being clearly shown it must follow that the domicile of origin continues. I know of no more convenient authority out of the many which have been cited to me than the well-known decision of the House of Lords in *Winans v. Attorney-General* (24).

[His Lordship considered the facts of that case, citing passages from the judgment. He cited, also, passages from *Ramsay v. Liverpool Royal Infirmary* (25) on the question of the evidence required to prove the acquisition of a domicile of choice, and continued:] It was argued by Mr. William Latey that it is sufficient for his purpose to establish that F. A. Gatty acquired a domicile of choice in any of the United States. That raises a point of some considerable interest, which I think, in the view I have formed of the facts here, it is not necessary for me to decide. However, I propose to discuss it shortly.

The view expressed by the editors of Dicey's Conflict of Laws (6th ed.), p. 83, is stated in the following terms: "The foundation of domicile in regard to area is, I think, the conception of "domicile being in a territory subject to one system of law". The United States, as I understand it, consists of a number of States each with its own courts and to some extent and for some purposes with a distinct system of law; applying the test of a

(24) [1904] A. C. 287.

(25) [1930] A. C. 588.

territory subject to one system of law, it would be essential to establish that a domicile of choice can only be acquired in a particular State and not in the United States of America generally.

There appears to be no direct authority for that proposition in so far as it concerns the United States of America in the English courts; although in 1932, in *Wahl v. Attorney-General* (26), it was decided by the House of Lords that English and Scottish domicile are essentially distinct and there can be no domicile in the United Kingdom as such. As I understand the opinions delivered by their Lordships in that case, the basis of that decision was the difference between the systems of law in England and Scotland.

But I have had the advantage of reading *Trottier v. Rajotte* (27), a judgment of the Supreme Court of Canada, which deals with the question of domicile in the United States of America. That case arose out of a claim for damages for personal injuries, and the question was whether a man whose domicile of origin was in the province of Quebec had acquired a domicile of choice in the United States or in one of them. The substance of the decision was this: since each State of the United States of America is a separate jurisdiction from the point of view of private international law, a person who alleges that he or she has acquired a domicile of choice in a particular State must prove an actual residence in that State with fixed settled determination of making his permanent residence therein; so that proof of residence or *animus manendi* in the United States generally without reference to any particular State is insufficient.

It is not necessary to review the facts in that case, but the judgment of the court, which was delivered by Sir Lyman P. Duff, C.J., made it clear that the Supreme Court of Canada would not accept the wide suggestion put forward that domicile of choice can be acquired in the United States of America generally as opposed to one particular State.

Sitting in this court, I am not bound by the decisions of the Supreme Court of Canada, though of course their judgments are always treated with the greatest respect and the greatest interest in the courts of this country. But, having read that judgment, based as it is on a long line of English decisions, and in particular on the decisions in *Winans v. Attorney-General* (28) and

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(26) 147 L. T. 382.

(27) [1940] 1 D. L. R. 433.

(28) [1904] A. C. 287.

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Ramsay v. Liverpool Royal Infirmary (29), I am bound to say with very real respect that I find the reasoning of the Chief Justice, Sir Lyman Duff, quite irresistible, and I desire to follow that decision and, if necessary, to apply it here.

I add the words "if necessary" for this reason. On my view of the facts I am not satisfied on the test laid down in *Winans v. Attorney-General* (30), that in the year 1897 F. A. Gatty had formed "a fixed and settled purpose", or "a determination" or "a final and deliberate intention" (31) to abandon his domicile of origin in England. I have no doubt at all that the possibility of such an abandonment was in his mind, having regard to the discussion with his second wife of social difficulties and inferences which would arise in England from his second marriage; but that he formed any intention to abandon his English domicile, either fixed or final or deliberate, I am not satisfied. If I answer that question in the negative, as I do, it must follow in my view that he had not formed the requisite intention of settling either in the State of North Dakota or in Massachusetts or in New York or any other State of the Union. But if it had become necessary for me to do so, I should have decided that he had formed no intention of settling in North Dakota or indeed in any other State of the Union. I should, if necessary, have gone further and said that his mind was undecided at the material time in choosing between the United States of America and Canada. Nor can I exclude from consideration the fact that he thought (though vaguely) of settling in Mexico.

Left as I am on the evidence in that state of complete indecision, I am bound to come to the conclusion that he never abandoned his domicile of origin in England; still less did he acquire a domicile of choice in the State of North Dakota.

I accept the argument of Mr. William Latey, based on the expert evidence of Mr. Crane, that if, for example, he had acquired a domicile of choice in the Commonwealth of Massachusetts, and had thereafter lived the necessary ninety days in the State of North Dakota and obtained a decree in the courts of the latter State, that decree would be recognized as valid throughout the United States of America as well as in the Commonwealth of Massachusetts. But I have found that he

(29) [1930] A. C. 588.

(30) [1904] A. C. 287.

(31) See *ibid.* 291, 292.

was not domiciled in Massachusetts nor in any other State of the United States of America.

From my findings it must follow that in English law the decree of the North Dakota court cannot be recognized; and it must further follow that the subsequent marriage in Winnipeg was invalid because at the time of the celebration of the Winnipeg marriage Mrs. Margaret Gatty was still the lawful wife of Frederick Alfred Gatty.

For these reasons I must reject the prayer in the petition, and dismiss the petition.

Petition dismissed.

The Attorney-General, who cited *Cunliffe v. Attorney-General* (32), was awarded his costs.

Solicitors: *Kingsford, Dorman & Co., for Milne, Moser & Sons, Kendal; The Treasury Solicitor.*

J. B. G.

(32) (1934) 103 L. J. (P.) 114.

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An act of sexual intercourse by a husband with his wife is absolutely conclusive (in the absence of fraud on her part) of the fact that he has thereby re-instated her as his wife; and that is so although the express object of the husband's actions was to effect a reconciliation.

Henderson v. Henderson [1944] A. C. 49 followed.

Bartram v. Bartram [1950] P. 1; *Mummery v. Mummery* [1942] P. 107 distinguished.

Whitney v. Whitney, ante, 250 overruled.

APPEAL from Mr. H. H. Maddocks, a metropolitan magistrate, sitting at Tower Bridge magistrates' court on December 5, 1950.

The parties were married in 1945, and there were two children, of six and four years, who were the subject of a guardianship order made in February, 1950, in favour of the husband. In

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July, 1947, the wife obtained a maintenance order on the ground of the husband's wilful neglect to maintain her. That order was discharged on November 28, 1947, on the ground of her adultery. There was no appeal against that discharge. At the end of March, 1950, she returned to the husband's home. She stated in giving evidence that her object was to try to effect a reconciliation, but the magistrate accepted the husband's version that she never really tried to effect a reconciliation, and that his own efforts to effect one were unavailing.

It was assumed by the Divisional Court that the magistrate was fully justified in finding that the husband did his best to make a fresh start, and that it was the wife's fault that that did not happen, although it was observed by the court that little attention appeared to have been paid to the fact that two of the inhabitants of the house where the husband was living were a young woman, the daughter of his housekeeper, and her child, aged one, of whom it was admitted that the husband was the father.

On at least three occasions, after the wife's return, the husband had sexual intercourse with the wife, and it was common ground that he had visited her bedroom for that purpose. The husband said that sexual intercourse began in May, 1950; the wife said April, 1950. In January, 1951, the wife gave birth to a child. She said that the husband was the father, but he disputed paternity. The husband, however, did not allege that the sexual intercourse had been obtained by fraud, under the pretence of return as a penitent wife, or that she was fraudulently concealing from him the fact that she was pregnant by another man. Indeed he stated in his evidence that he had had intercourse with her after he had suspected her of being pregnant by someone else, and that he had done so in the hope of a reconciliation.

On October 27, 1950, the husband turned the wife out. He stated that he did so because "she was coming and going as she "pleased and I could not stand it any longer".

The wife took out a summons alleging desertion. That summons was dismissed on December 5, 1950, at the Tower Bridge court, and the wife appealed.

The magistrate gave the following reasons for dismissing the summons:—

"I was quite satisfied that there had been no resumption of "cohabitation between the parties. I believe that the husband "took the wife into his home because she was destitute, and had

“ nowhere to go. His housekeeper endeavoured to effect a reconciliation between them, and the husband co-operated, and had sexual intercourse with her for the purpose. The attempt failed by reason of the conduct of his wife.

“ I was satisfied that she was, during the period she resided there, very rarely in the house, and that she never attempted to do any housework or behave as a wife. In so far as her evidence conflicts with the evidence of her husband or his housekeeper, I unhesitatingly prefer their evidence ”.

G. E. Empson for the wife (the appellant).

P. R. Hollins for the husband.

LORD MERRIMAN, P. In my opinion this case raises a question of some importance, and it will be necessary to consider the bearing upon it of certain authorities. Let me say at once, so that I do not overlook it, that, as I understand the matter, none of these authorities, nor, indeed, any authorities, were brought to the attention of the magistrate.

Before I discuss the law it is necessary to give an outline of the facts. [His Lordship stated the facts as summarized above, saying that the magistrate had plainly accepted the evidence of the husband in preference to that of the wife, and that he (his Lordship) proposed to determine the case on that footing. His Lordship continued:] The position, therefore, is this: it is clear that when the wife returned to the husband's home she was completely at mercy; he was not obliged to receive her. He says that he received her out of pity, because she had nowhere to go, and I assume that to be the case; it is clear that if she came, so to speak, merely as a lodger or a refugee, the husband's position, established by the revocation of the wife's order of 1947 on the ground of her subsequent adultery, would remain completely unimpaired.

That, in effect, is what the magistrate has found. The clerk notes that the magistrate said briefly there was “ no re-union “ between the parties when the wife returned in April or later ”. That is amplified in the reasoned statement of the grounds for dismissing the summons. [His Lordship read that statement and continued:] The question is therefore whether, as a matter of law, it is possible for the magistrate to have satisfied himself that there had been no resumption of cohabitation between the parties. I have already said that so far as I am aware no authorities were cited to him; but there is a decision of Willmer, J., in

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Whitney v. Whitney (1) which it is plainly necessary for us to consider. It is, in fact, so far as I am aware, the only authority by which this decision could be supported. I shall come back to it in more detail later. [His Lordship referred to the headnote and continued:] Two authorities were considered in the course of that case, and it will be necessary for us to consider them and their bearing on this case. One authority was not considered, which seems to be decisive both of this case and of *Whitney v. Whitney* (1). The two authorities which were considered are *Mummery v. Mummery* (2), a decision of my own, and *Bartram v. Bartram* (3), in which *Mummery v. Mummery* (2) was approved. The case which was not considered is *Henderson v. Henderson* (4), decided in the House of Lords.

In my opinion it is necessary to go shortly through these cases in order to arrive at a correct decision of the appeal now before us. I need not go into *Mummery v. Mummery* (2) in detail, because it was fully reviewed in *Bartram v. Bartram* (3), to which I shall have shortly to refer, but it is, I think, desirable to say just this much about *Mummery v. Mummery* (2):—It was, as the facts show, a very special case. It was the case of a deserted wife, who had been deserted for years but who ardently desired to effect a reconciliation, taking advantage of the fact that her husband, rescued from Dunkirk, had called on her on his way to the home where he was living, to attempt to effect a reconciliation by letting him sleep with her that night and have sexual intercourse. The question was whether the desertion then established was interrupted, or alternatively condoned, by that fact. The key to the decision was that the wife alone desired reconciliation, while the husband made it plain beyond the shadow of a doubt that he had not the slightest wish or intention to resume cohabitation with his wife.

The two things which it is, in my opinion, vital to remember in *Mummery v. Mummery* (2) (and I say this because when we come to *Bartram v. Bartram* (3), and the use of certain passages from one of the judgments in that case by Willmer, J., in *Whitney v. Whitney* (1), it will be seen, I think, that Willmer, J., has misunderstood the true effect of *Mummery v. Mummery* (2)) are these:—(1.) that it was the wife who was the petitioner, not the husband, and (2.) that there was no bilateral intention to resume cohabitation. It was held to be, and plainly was, a case of a

(1) Ante, 250.

(2) [1942] P. 107.

(3) [1950] P. 1.

(4) [1944] A. C. 49.

unilateral wish on the part of the wife, rejected in the plainest possible terms by the husband. With that I think I need cite only one sentence from my judgment (5): "In my view, the law is that, as regards the wife at any rate, an act of sexual intercourse is not conclusive on the question of condonation, and that it does not raise an irrebuttable presumption that cohabitation has been resumed". I pause to observe that that judgment was given before the House of Lords; in *Henderson v. Henderson* (6), re-emphasized in unmistakable manner the essential difference between the position of a husband and the position of a wife in connexion with sexual intercourse as proof of condonation.

Henderson v. Henderson (6) was a case of a husband's petition on the ground of adultery. The wife had committed adultery, but promised her husband that if he would forgive her she would break off all acquaintance with the co-respondent. "Thereupon" [I am quoting from the headnote] "intercourse took place" [one single act of intercourse], "but early next morning the wife's attitude changed and she said she did not see why she should stop seeing the co-respondent:—Held, that as there was no evidence that, when it was made, the wife's promise was a fraudulent misstatement of her state of mind, the husband's act in consenting to intercourse amounted to condonation debarring him from obtaining a divorce. Sexual intercourse amounts to condonation of a wife's adultery unless she induced it by a fraudulent misstatement of fact. The breach of an assurance as to future conduct will not remove the disabling consequences of condonation, since there is no such thing as contingent condonation". It is, I think, vital to the decision of the present appeal to consider the essential points in the reasoning of Lord Simon, whose opinion was formally concurred in by the other learned Lords. He begins by dealing with the essence of the matter (7): "The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by re-instating her as his wife. Whether this re-instatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back into the position of wife in the home, though further intercourse has not taken place, but where it has taken

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(5) [1942] P. 107, 110.

(7) Ibid. 52.

(6) [1944] A. C. 49.

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“ place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect ”. Lord Simon then deals with the issue of fraud. I have already dealt with that issue in the present case, and Mr. Hollins frankly admitted that it was quite impossible for him to say, in view of the evidence, that the sexual intercourse in this case had been obtained by fraud. *Mummery v. Mummery* (8) had been cited to their Lordships (9). It was not specifically mentioned in Lord Simon’s speech, but he said (10): “ It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband’s previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations ”. I need not read the rest of the passage, but it develops the same point, and after referring to a decision of this court in *Abercrombie v. Abercrombie* (11), which was exactly in point, Lord Simon says (12), “ condonation is not a contract at all. It is the overlooking of past wrongs accompanied by action on the part of the aggrieved spouse which shows that they are really forgiven, and the circumstance that the guilty party, before or at the time of condonation, makes promises as to future conduct cannot lead to the consequence that previous offences are no longer condoned, if and when the promises are afterwards repudiated ”. He then refers once more to the question of fraud, with which I need not deal further.

It seems to me that the magistrate, having been unfortunate enough not to have had this case cited to him, expresses in his statement of his reasons exactly the contrary of what Lord Simon said at the beginning of his speech. After saying that there had been no resumption of cohabitation between the parties and that the husband had taken the wife into his home because she was destitute and had nowhere to go, the magistrate continues (I will read the words again): “ His housekeeper endeavoured to effect a reconciliation between them and the husband co-operated, and had sexual intercourse with her for this purpose. The attempt failed by reason of the conduct of his wife ”. Lord Simon says exactly the opposite. Lord Simon says there may be a re-instatement without sexual intercourse, but, as against the husband, if there is sexual intercourse and no fraud, that is conclusive.

(8) [1942] P. 107.

(9) [1944] A. C. 49, 50.

(10) Ibid. 53.

(11) (1943) 169 L. T. 340.

(12) [1944] A. C. 49, 54.

Conclusive of what? Conclusive of re-instatement; conclusive of the fact that the husband has confirmed his forgiveness by re-instating his wife as his wife. The magistrate treats as being the vital matter the husband's wish to effect a reconciliation, and not the conclusive acts which show that a reconciliation has, in fact, been effected.

I now come to *Bartram v. Bartram* (13). I should not have found it necessary, for the purposes of the case before us, to refer to *Bartram v. Bartram* (13), save for the fact that it affirms and approves the judgment in *Mummery v. Mummery* (14). The reason that it is necessary to refer to it is because, as I say, this judgment of the magistrate can only be supported by upholding *Whitney v. Whitney* (15), and *Whitney v. Whitney* (15) turns, as I think, on an incorrect appreciation of the effect of *Bartram v. Bartram* (13). It is essential to remember that the element of sexual intercourse in *Bartram v. Bartram* (13) was completely absent; and that is all-important, because it was a case in which the husband was the petitioner. His petition was based on an allegation of desertion. As in this case, because the wife had nowhere else to go, the husband took her under his roof, but she resolutely refused all overtures of reconciliation, and, as I have said, it is a cardinal fact that no sexual intercourse took place.

In those circumstances the Court of Appeal adopted from *Mummery v. Mummery* (14) the view that a resumption of cohabitation involved bilateral intention, and I think it only necessary to make one passing comment on one passage in the judgment of Denning, L.J., in which he also considers *Mummery v. Mummery* (14). He said (16): "Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time. That was laid down by Lord Merri-man, P., in *Mummery v. Mummery* (14), and has never been doubted since". I should not venture to make even this observation if it were not that this particular passage forms the foundation of Willmer, J.'s judgment in *Whitney v. Whitney* (15). I have already tried to explain that the whole point of *Mummery v. Mummery* (14) was that the parties (in the plural) did not attempt a reconciliation. It was one party who attempted the reconciliation, the other who resolutely resisted it; and that is not merely the point of the decision itself, but is also the point of the

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(13) [1950] P. 1.

(14) [1942] P. 107.

(15) Ante, 250.

(16) [1950] P. 1, 6-7.

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argument leading up to the decision; for I see that I am reported as saying (17): "Obviously the fact that during a period of desertion the parties met by arrangement to talk over their difficulties and the deserted wife did her best to persuade her husband to return to her while he remained obdurate, would not compel the court to hold, however protracted the meetings and even if they involved the parties spending the night or several nights under the same roof, that the state of desertion was brought to an end". The whole emphasis is on the fact that the intention or the attempt to effect a reconciliation is unilateral, and not bilateral, and there has, in fact, been a decision of this court in that sense. But for the rest, although that passage in Denning, L.J.'s judgment is used by Willmer, J., in support of his decision in *Whitney v. Whitney* (18), I think it only necessary to say that when Denning, L.J., said (19) that a "period of desertion does not cease to run unless and until a true reconciliation has been effected. Any other view would greatly hamper attempts at reconciliation, because it would mean that the deserted party would be disinclined to take the other back for fear of losing his legal rights in case the attempt at reconciliation was unsuccessful", the passage must be read, as every judgment must be read, according to the subject-matter. It is not fair to the Lord Justice to take it out of its context and to assume that he is laying it down that in all circumstances, including such circumstances as those in the present case, because a reconciliation does not ultimately come about, therefore desertion should be held to have been continuing the whole time. It was a judgment delivered in a case where, though it was a husband's petition, the element of sexual intercourse, not induced by fraud, was completely lacking.

That brings me finally to the judgment in *Whitney v. Whitney* (20). [His Lordship referred to the facts of that case and continued:] The judge held, nevertheless, that there was no interruption to the period of desertion, and, incidentally, that there was no condonation. I have already observed that *Henderson v. Henderson* (21) does not appear to have been cited. *Mummery v. Mummery* (22) was examined at length, including the sentence which I have already read, about the act of sexual intercourse not being conclusive on the question of condonation, as regards

(17) [1942] P. 107, 110.

(18) Ante, 250, 256.

(19) [1950] P. 1, 7.

(20) Ante, 250.

(21) [1944] A. C. 49.

(22) [1942] P. 107.

the wife, at any rate. With regard to that Willmer, J., said that clearly in that case I had stated the proposition of law on which I was relying "in terms wide enough to cover the present case". He continued (23): "It may be argued that what the President said was peculiar to the case before him, which is a conclusive authority only in a case where a single act of intercourse took place, and where the innocent party was the wife. Here we have not one occasion, but a number of occasions, to deal with, and it may be said that this is not, like *Mummery v. Mummery* (24), a case of an innocent party permitting intercourse on only one occasion at the instance of the other party. The facts in this case are, undoubtedly, different from those in *Mummery v. Mummery* (24). If that case stood alone, wide as the President's words are, I might have experienced some difficulty in holding that they extended to cover the present case. But I have also received assistance from *Bartram v. Bartram* (25), a decision of the Court of Appeal".

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Before I pass on to what the judge said about *Bartram v. Bartram* (25), I venture to dissent from the description of my judgment in *Mummery v. Mummery* (24) implied in the phrase "wide as the words are". Although, as I have said, at that time *Henderson v. Henderson* (26) had not been decided, I was very careful to say "as regards the wife at any rate"; and I was dealing with the petition of a deserted wife.

Willmer, J., goes on to consider *Bartram v. Bartram* (25). He refers to the citation in *Bartram v. Bartram* (25) of *Mummery v. Mummery* (24), and then relies on the passage in Denning, L.J.'s judgment contained in the first paragraph of that judgment, to which I have just referred, and concludes: "*Bartram v. Bartram* (25) carries with it an authoritative statement of principle by the Court of Appeal, and it is for me to apply that principle as best I can to the present case"; and applying it, he came to the conclusion that desertion had never been interrupted.

I venture to say that the judge misdirected himself, because he ignored the vital fact that in *Bartram v. Bartram* (25) there was lacking the essential element, which is present in the case we are now deciding, that the husband petitioner had voluntarily had sexual intercourse with his wife, and that *Henderson v. Henderson* (26) decides that that is absolutely conclusive of the fact that he has thereby re-instated her as his wife. With the

(23) Ante, 250, 254.

(24) [1942] P. 107.

(25) [1950] P. 1.

(26) [1944] A. C. 49.

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greatest possible respect to the judge, it is in my opinion quite impossible to hold, in relation to a long period during which, at intervals, the husband has voluntarily had sexual intercourse with his wife with the express object of effecting a reconciliation, that in fact there has been no re-instatement at all, and that desertion was running continuously throughout the period; or that an alternation of condonation and revival after each act of sexual intercourse leads to the same conclusion.

The judgment of the magistrate can only be supported, in my opinion, if *Whitney v. Whitney* (27) was rightly decided. I think that it was wrongly decided, and that it is our duty to say so. And I think, equally, that the magistrate's judgment is not supportable when once the suggestion of fraud is eliminated.

For these reasons this appeal succeeds; for, there being no longer the impediment of her adultery, the wife has been thrown out of the matrimonial home for reasons which could not possibly be considered as being "a grave and weighty matter", if once it is established, as I think it is established, that the husband had, in law, re-instated her as his wife. That being so, there is no answer to her charge of desertion, and the matter must be referred back to the magistrate, unless an amount can be agreed upon, for him to settle the amount of the order.

HAVERS, J. I agree with the conclusion at which my Lord has arrived, and also with the reasons which he has given for that conclusion. As, however, we are differing from the magistrate, I think that it is desirable to give my own reasons in my own words.

First I will set out the material facts, so far as necessary, very briefly. [His Lordship stated those facts, saying that in view of the magistrate's reasons he would base his judgment, so far as the facts were concerned, on the evidence of the husband where it conflicted with the evidence of the wife. His Lordship continued:] The question for us to determine is whether, as regards a husband, an act, or acts of sexual intercourse, is or are conclusive on the question of condonation, because the magistrate must have held that as regards the husband acts of sexual intercourse were not conclusive on that question. It is fair to say that if the decision of the House of Lords in *Henderson v. Henderson* (28) had been cited to the magistrate, I cannot help feeling that he would have been very unlikely to have come to the conclusion to

(27) Ante, 250.

(28) [1944] A. C. 49.

which he did. My Lord has already cited the passages from the speech of Lord Simon in *Henderson v. Henderson* (28), a speech with which the other learned Lords agreed, and it seems to me that one short passage clearly establishes the law relating to condonation in a case where it is the wife who has been guilty of the matrimonial offence. The passage reads as follows (29): "The essence of the matter is (taking the case where it is the wife who has been guilty of the matrimonial offence) that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife. Whether this reinstatement goes to the length of connubial intercourse depends on circumstances, for there may be cases where it is enough to say that the wife has been received back in the position of wife in the home, though further intercourse has not taken place, but where it has taken place, this will, subject to one exception, amount to clear proof that the husband has carried his forgiveness into effect". Lord Simon goes on to specify the one exception, namely, a case where the intercourse was induced by fraudulent misstatement of fact by the wife. In another passage Lord Simon says (30): "There cannot be such a thing as contingent condonation by a husband of his wife's adultery—certainly not when the condonation includes the irrevocable act of sexual connexion". In the light of that decision, it seems to me to be clearly established that a husband who with knowledge of a matrimonial offence committed by his wife has sexual intercourse with her, cannot in law be heard to say that he has not condoned that matrimonial offence and reinstated her as a wife. I leave out the particular exception to which Lord Simon referred, since, as my Lord has already mentioned in the course of his judgment, it was made clear by Mr. Hollins, who appeared for the husband, that he was not in a position to contend on the facts of this case that the sexual intercourse which took place was effected by means of any fraud on the part of the wife, and, indeed, that case was never presented in argument to the magistrate, and there was no finding by the magistrate on it.

In my opinion the decision in *Henderson v. Henderson* (28) is conclusive of the case which we have to determine, and in the light of that decision it seems to me that the magistrate's decision cannot be supported in law. It would be enough to dispose of

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(28) [1944] A. C. 49.

(30) Ibid. 53.

(29) Ibid. 52.

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this case for me to leave the matter there, but as certain authorities have been discussed in argument, and it may be, (though we do not know), that one of those cases was in the mind of the magistrate when he reached his conclusion, I will make a brief reference to them.

The first is *Mummery v. Mummery* (31). In considering that case, as, indeed, in considering any case, it is all-important to ascertain what are the facts to which the judgment relates. [His Lordship stated those facts and continued:] As my Lord has pointed out, there were two fundamental matters on which that judgment was based: the first fact was that in that case it was an innocent wife who was the petitioner, and consented to the act of marital intercourse, and not a husband; and the second fact was that this was a case where one party only was desiring a reconciliation, namely, the wife. The husband, so far from desiring reconciliation, never had any intention or desire to be reconciled at all. In my view, the scope of the judgment can be ascertained from the short passage which my Lord has already cited (32): "In my view, the law is that, *as regards the wife at any rate*" (and these, as I interpret the judgment, are the all-important words), "an act of sexual intercourse is not conclusive on the question of condonation, and that it does not raise an irrebuttable presumption that cohabitation has been resumed". I find nothing in *Henderson v. Henderson* (33) which is in the least degree inconsistent with that judgment, when the limited application which I think the judgment has and was intended to have is considered. On the contrary, Lord Simon said in *Henderson v. Henderson* (33): "It has been more than once pointed out that the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequent intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking off relations". But such a conclusion has no application to the facts of this case at all.

The only other authority to which I think I ought to refer is *Whitney v. Whitney* (34), a recent decision of Willmer, J., because it may be prayed in aid to support the decision of the magistrate. [His Lordship referred to the facts of, and the decision in, that case and continued:] The judge, if I interpret

(31) [1942] P. 107.

(32) Ibid. 110.

(33) [1944] A. C. 49, 53.

(34) Ante, 250.

his judgment correctly, seems to have founded himself partly on the view which he took of the decision of my Lord in *Mummery v. Mummery* (35), and partly on the decision of the Court of Appeal in *Bartram v. Bartram* (36). He does, however, appear to have had some doubt whether *Mummery v. Mummery* (35) was ever intended to be applied beyond the particular facts to which it related, because he says (37): "In that case Lord Merriman, P., stated the proposition of law on which he was relying in terms wide enough, in my opinion, to cover the present case. It may be argued that what the President said was peculiar to the case before him, which is a conclusive authority only in a case where a single act of intercourse took place, and where the innocent party was the wife. Here we have not one occasion, but a number of occasions, to deal with, and it may be said that this is not, like *Mummery v. Mummery* (35), a case of an innocent party permitting intercourse on only one occasion at the instance of the other party. The facts in this case are, undoubtedly, different from those in *Mummery v. Mummery* (35). If that case stood alone, wide as the President's words are, I might have experienced some difficulty in holding that they extended to cover the present case". However, it seems that notwithstanding that passage, the judge did take the view that *Mummery v. Mummery* (35) was wide enough to cover the facts of the case with which he was dealing. If so, I feel unable to take the same view as the judge as to the extension of *Mummery v. Mummery* (35) beyond the facts of the case to which it related.

It will be observed that *Henderson v. Henderson* (38) was not cited to the judge in *Whitney v. Whitney* (39), and if and so far as *Whitney v. Whitney* (39) purports to decide that a husband who, with full knowledge of his wife's matrimonial offence, has sexual intercourse with her does not in law condone that offence, I feel constrained to say that I am unable to agree with it, and am bound to express my opinion that it has not been correctly decided.

The other case from which the judge stated that he derived assistance was *Bartram v. Bartram* (40). It is unnecessary for me to do more than say that with regard to that case my Lord has pointed out that one essential element was missing in *Bartram v. Bartram* (40), namely, the fact that there was no intercourse

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(35) [1942] P. 107.

(36) [1950] P. 1.

(37) Ante, 250, 254.

(38) [1944] A. C. 49.

(39) Ante, 250.

(40) [1950] P. 1.

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in that case by the husband with his wife, and, for the reasons which my Lord has given, I take the view, with great respect to the judge, that *Bartram v. Bartram* (40) does not support the conclusion at which he arrived.

I am, therefore, of the opinion that this case is covered by the decision of the House of Lords in *Henderson v. Henderson* (41), and that in law the conclusion of the magistrate cannot be supported. I only need to add that, if that is the correct view of the law, there can be no doubt that the husband turned his wife out of the house on October 27, 1950, and there is, therefore, clearly no answer to the charge of desertion. I agree, therefore, with the conclusions which my Lord expressed, for the reasons which I have given, and also for the reasons which he has given, and I agree that the appeal must succeed.

Appeal allowed.

Solicitors: *Hepburns, Peckham; Hawker & Wheatley.*

J. B. G.

(40) [1950] P. 1.

(41) [1944] A. C. 49.

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POOL v. POOL.

Husband and wife—Evidence—Privilege—Meeting to explore possibility of reconciliation—Occasion privileged.

When the correct inference to be drawn from all the circumstances is that there is a tacit understanding that a meeting is to be “without prejudice” which takes place by way of an attempt made with the help of their respective counsel and solicitors to effect a reconciliation between husband and wife at a time when matrimonial proceedings are pending, that meeting is privileged and no evidence with regard to what transpired at it will be admissible in the proceedings if they eventuate; and that is so although the words “without prejudice” are not specifically used in relation to that meeting.

McTaggart v. McTaggart [1949] P. 94; *Mole v. Mole*, ante, 21, applied.

Bostock v. Bostock [1950] P. 154 not followed.

OBJECTION to admissibility of evidence.

The parties were married in 1946. There was one child, born in 1947. In April, 1949, the wife filed a petition for divorce on

the ground of cruelty. The husband by his answer denied the allegation. The wife was represented by S. E. Karminski, K.C. (now Karminski, J.), and junior counsel; the husband by junior counsel; and, at the request of the parties and their solicitors, a meeting took place in leading counsel's chambers in November, 1949, at which counsel and solicitors for both parties were present, as was the husband. At that meeting leading counsel for the wife took the chair, with a view to exploring the possibility of a reconciliation. A further and similar meeting took place in February, 1950, at which the wife as well as the husband was present. Arrangements were then made for the parties to meet privately. They stayed together at the respondent's parents' house, and thereafter, on three separate occasions, at hotels. The last occasion that they stayed together was in June, 1950.

The petition was dismissed by consent on November 10, 1950; on November 18, 1950, the wife presented a second petition for divorce on the ground of cruelty. The allegations of cruelty in that petition were all dated subsequent to February, 1950, and were alleged to have taken place during the attempt at reconciliation. It had been agreed between the parties that no reference should be made to the allegations in the earlier petition, which the wife had withdrawn after the meeting in November, 1949. The judge concurred at the trial in this course being taken.

Counsel for the husband called as a witness on subpoena Karminski, J., who went into the witness box. Objection was taken on behalf of the wife to questions put to Karminski, J., concerning the November meeting on the ground that that meeting was privileged, though counsel subsequently waived any privilege there might be in respect of the second meeting.

R. E. Manningham-Buller, K.C., and *J. A. Petrie* for the wife.

Peter Evans for the husband. It is sought to adduce this evidence in reliance on *Bostock v. Bostock* (1).

[*Havers, J.* Is there any distinction in principle between a case where the parties have a probation officer present and a case where leading counsel is present for precisely the same purpose?]

It is the function of the probation officer to try to effect a reconciliation, but it is not the normal function of leading counsel. *Bostock v. Bostock* (1), in which solicitors, though not counsel, were present, is not distinguishable. Moreover, there had been

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correspondence between the parties on the eve of the trial, and such correspondence would not be privileged unless specifically stated so to be. There is no distinction between such correspondence and the meeting, and unless such a meeting is expressly stated to be without prejudice, all matters that occurred at it can and should be brought to the notice of the court. [He referred also to *McTaggart v. McTaggart* (2).] Leading counsel here was not a third party or an intermediary selected to effect a reconciliation.

Manningham-Buller, K.C. Reliance is placed on *Mole v. Mole* (3), in which *Bostock v. Bostock* (4) was disapproved by Denning, L.J., and on *La Roche v. Armstrong* (5), cited by Cohen, L.J., in *McTaggart v. McTaggart* (2). There was a "tacit understanding" that the conversations were to be without prejudice, and it is submitted that as a matter of fact the sole object of the meeting must be held to have been the effecting of a reconciliation. [He referred also to the Summary Procedure (Domestic Proceedings) Act, 1937.]

HAVERS, J. The preliminary question for decision is whether either or both of these two meetings held in leading counsel's chambers on November 18, 1949, and February 28, 1950, are privileged or not. Although I of course derive great assistance from the authorities cited, I agree with the submission made by Mr. Manningham-Buller that the real question is one of fact.

At the first meeting counsel were present on behalf of both the husband and the wife: Mr. Seymour Karminski, K.C., as he then was, and his junior, for the wife, and Mr. Evans for the husband. Solicitors were also there, as was the husband. The wife was absent.

It is quite plain from Karminski, J.'s evidence that nobody actually used the words "without prejudice"; but it is equally plain from that evidence that the sole object of the meeting was to try, with the help of counsel, to effect a reconciliation between husband and wife, the litigation then being in such an advanced state that the suit was likely to be heard in the course of the next few days.

The first of the authorities in point of date to which I have been referred is *McTaggart v. McTaggart* (6), the headnote to which (in the Law Reports) states: "Where, at the hearing of a

(2) [1949] P. 94.

(3) Ante, 21.

(4) [1950] P. 154.

(5) [1922] 1 K. B. 485.

(6) [1949] P. 94.

“petition for divorce, evidence, relevant to the issue, is tendered
 “as to what was said at an interview between the spouses,
 “arranged, with a view to their reconciliation, by a probation
 “officer, at which he himself was present, then if either the
 “husband or the wife objects (on the ground that it is privileged
 “from disclosure), to such evidence being given either by the
 “other spouse or the probation officer, the objection is valid in
 “law, since the discussion at the interview, between the three of
 “them, must be considered as made ‘without prejudice’, even
 “though nothing is said to that effect. The estrangement having
 “reached a stage where the spouses consult a probation officer, it
 “is clear that the dispute, if there is no reconciliation, may reach
 “either a court of summary jurisdiction or the Divorce Court, and
 “that accordingly litigation is imminent. The probation officer
 “himself can make no claim to such privilege”.

Counsel referred to passages in the judgment of Cohen, L.J., where he lays down the principle and explains the reasons for it, which are of great assistance. He said (7): “In my opinion
 “the judge had no alternative. The privilege, if any, was the
 “privilege of the parties, and they, having given evidence on
 “what was said at the interview, could not assert the privilege.
 “The result is, none the less, unfortunate as the success of
 “attempts at reconciliation might be prejudiced if it became
 “known that the probation officer could be called subsequently
 “to give evidence, and I desire to make it clear that, as at
 “present advised, I think that, if objection had been taken by
 “the wife to the husband giving evidence as to this issue the
 “objection would have been valid. Such a conclusion seems to
 “me to be within the principle that discussions and correspon-
 “dence in negotiations if ‘without prejudice’ are privileged,
 “unless the parties waive the privilege”.

Cohen, L.J., then referred to *La Roche v. Armstrong* (8), cited by Mr. Manningham-Buller, and quoted these observations of Lush, J. (8): “‘There is no authority upon the point’—that
 “was the question as to whether certain matters should be
 “admitted in evidence—’ but my reason is that to rule otherwise
 “‘would in many cases make negotiations for the settlement of
 “‘litigation almost impossible. Unless parties to such negotia-
 “‘tions can feel safe in making an offer and stating the facts
 “‘upon which it is based, the door to negotiations may be closed.

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(7) [1949] P. 94.

P. 1951.

(8) [1922] 1 K. B. 485.

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“ ‘ It is for the benefit of litigants and others that statements
“ should be freely made in order to settle litigation ’ ”.

That applies with peculiar emphasis to any negotiations to attempt a reconciliation where there has been a matrimonial dispute between a husband and a wife. Indeed, Denning, L.J., said (9): “ I agree and desire particularly to associate myself with
“ the observations which Cohen, L.J., has just made. It seems
“ to me that negotiations which take place in the presence of the
“ probation officer, with a view to reconciliation are on the under-
“ standing, in the ordinary way, by all concerned, that they are
“ to be without prejudice to the rights of the parties. The rule
“ as to ‘ without prejudice ’ communications applies with especial
“ force to negotiations for reconciliation ”.

In that case a probation officer was present. Mr. Evans submits that there is a fundamental distinction between a case like that and a case like this when no probation officer was present, and he referred to *Bostock v. Bostock* (10). The headnote to that decision (in *The Law Reports*) reads: “ Although a
“ meeting between the parties to a matrimonial dispute in the
“ presence of a probation officer must be taken to be without
“ prejudice when that meeting has been arranged for the purpose
“ of attempting to effect a reconciliation, an interview between
“ the parties and their respective solicitors with a similar purpose
“ in view is not to be taken to be without prejudice if it is not
“ specifically stated so to be; and evidence of what occurred at
“ such a meeting may accordingly be given notwithstanding
“ objection by one of the parties.

“ *McTaggart v. McTaggart* (11) distinguished ”.

[His Lordship read *Ormerod, J.*’s judgment and continued :—] Mr. Evans, naturally, relies upon that case very strongly. It is, however, to be observed that *Ormerod, J.*, though apparently he took the view that such a meeting is not to be presumed to be taken to be without prejudice, if it is not specifically stated so to be, does admit an exception, namely, a meeting to arrange a reconciliation where a probation officer is present.

I pay, of course, the greatest respect to, and, if I could, would follow, that decision. The case, however, has been considered in *Mole v. Mole* (12), in which (to quote the headnote in *The Law Reports*) it was held that: “ Where litigation is
“ imminent between husband and wife, as soon as a probation

(9) [1949] P. 94, 97.

(10) [1950] P. 154.

(11) [1949] P. 94.

(12) Ante, 21.

“ officer is asked by either husband or wife to act as an intermediary between them with a view to reconciliation, a statement, written or oral, made by either party to him is privileged. The rule in *McTaggart v. McTaggart* (13) is not confined to cases where husband and wife have both accepted the probation officer as conciliator ”.

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Bucknill, L.J., said, in his judgment (14): “ There was some confusion at the trial about this letter, because the husband took the objection, when the probation officer was called, that his letter answering the officer was privileged in accordance with the opinions given by two Lords Justices in *McTaggart v. McTaggart* (13). The commissioner ruled that it was not privileged. He seems, however, to have dismissed the letter as a valuable piece of evidence by saying that the husband wrote it in pique and did not really mean what he said. In my opinion the letter was privileged and should not have been admitted. Mr. Seuffert [for the wife] argued that the opinions expressed by the Lords Justices in *McTaggart v. McTaggart* (13) only applied when both sides had accepted the probation officer as a conciliator between them; but I do not think that that is what was intended in those opinions ”.

Denning, L.J., stated (15): “ I agree so fully with all that Bucknill, L.J., has said that I do not wish to add anything except to say that I do not for my own part accept the correctness of the decision in *Bostock v. Bostock* (16). I take it that the principle laid down in *McTaggart v. McTaggart* (13) applies not only to probation officers but also to other persons such as clergy, doctors, or marriage guidance councillors, to whom the parties or one of them go with a view to reconciliation, there being a tacit understanding that the conversations are without prejudice. I see no reason why the solicitors of the parties should be in any different position ”.

I agree respectfully with the opinion which Denning, L.J., expressed in that case, and I prefer to follow it rather than the decision of Ormerod, J., in *Bostock v. Bostock* (16). The view which I take about the facts in this case is that the parties were resorting to a team of counsel, to use the language of Mr. Evans, headed by Mr. Seymour Karminski, K.C., with a view to reconciliation. I feel bound to draw the inference that, in all the circumstances of this case, there was a tacit understanding that

(13) [1949] P. 94.

(14) Ante, 22.

(15) Ibid. 24.

(16) [1950] P. 154.

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the conversations were without prejudice, and I therefore hold on the first point submitted to me that these two interviews were privileged.

With regard to the second meeting, I take the view that it was merely a continuation of the first, and held in similar circumstances, and is, therefore, privileged.

Solicitors: *Haslewood, Hare & Co.*; *Coode, Kingdon, Cotton & Ward.*

J. B. G.

1951
 June 1; 22.

HARRISON v. HARRISON.

Barnard, J.

Husband and Wife—Custody—Child born while parents living in adultery—Subsequent marriage and divorce of parents—Application for custody refused—Provision for child's support—Matrimonial Causes Act, 1950 (14 Geo. 6, c. 25), s. 26, sub-s. 1.

The court cannot make an order under s. 26, sub-s. 1, of the Matrimonial Causes Act, 1950, for the custody of a child if the child's father or mother was married to a third person when he was born.

Dicta in *Green v. Green* [1929] P. 101, 104, and *Colquitt v. Colquitt* [1948] P. 19, 24, followed.

Dictum in *M. v. M.* [1946] P. 31, 33, not followed.

If, however, the mother has the de facto custody of the child, the fact that a man marries a woman with a young child, whether he be the father of the child or not, is a matter which the court will take into consideration in awarding the woman maintenance after a dissolution of the marriage, assuming the child to be still under age and needing support.

SUMMONS (adjourned into open court).

In 1938, while the parties were living in adultery (the wife being then married to another man), the wife gave birth to a child of whom the husband was the father. The wife's earlier marriage was dissolved on the ground of that adultery in February, 1943; and in April, 1943, the parties were married. The child therefore could not be legitimated under the Legitimacy Act, 1926.

On March 13, 1951, the wife was granted a decree nisi of

divorce on the ground of the husband's cruelty and desertion; that decree was made absolute on May 17, 1951. In her petition the wife asked *inter alia* for custody of the child and for maintenance of the child, and the question of custody was adjourned to chambers, and from chambers into open court for argument and judgment. The application for custody was made under s. 26, sub-s. 1, of the Matrimonial Causes Act, 1950 (1).

On July 10, 1947, the wife had applied to the justices for maintenance for herself and for the child under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925; she was awarded maintenance for herself only, and her application in respect of the child was dismissed.

John B. Gardner for the wife. The words "children, the "marriage of whose parents is the subject of the proceedings" in s. 26, sub-s. 1, and the similar words—"children of the "petitioner and the respondent"—in sub-s. 2 (which concerns proceedings for restitution of conjugal rights), which were used in the corresponding sections dealing with custody in the earlier statutes (2), are equally applicable to legitimate and illegitimate children, and are to be distinguished from the more restricted phrase "children of the marriage" used in ss. 2, 23, 24 and 25 of the Act of 1950, and in s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, s. 5, sub-s. 2 (b), of the Licensing Act, 1902, s. 1, sub-s. 1, of the Married Women (Maintenance) Act, 1920, and s. 5 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. It is submitted that the legislature has given the court power by this distinctive wording to make an order for custody in a case such as the present.

The paramount consideration in *any* proceedings where the custody or upbringing of an infant is in question is the welfare

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(1) Matrimonial Causes Act, 1950, s. 26, sub-s. 1: "In any proceedings "for divorce or nullity of marriage "or judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court".

Summary Jurisdiction (Married Women) Act, 1895, s. 5: "The court "of summary jurisdiction . . . may "make an order containing . . . (b) a "provision that the legal custody of "any children of the marriage between "the applicant and her husband . . . "be committed to the applicant . . .".

(2) I.e., s. 35 of the Matrimonial Causes Act, 1857, s. 4 of the Matrimonial Causes Act, 1859, s. 6 of the Matrimonial Causes Act, 1884, and s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925.

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of the infant (s. 1 of the Guardianship of Infants Act, 1925); and it is submitted that it is in accord with that section that the court should have jurisdiction to make an order for the custody and maintenance of an illegitimate child under s. 26 of the Act of 1950 after its parents have been divorced. If s. 26 is held to be applicable in the present case, an order may be made for the maintenance of the child, which the wife was necessarily refused by a court of summary jurisdiction in view of the different wording of the relevant section.

The wording of s. 26 (then s. 193 of the Act of 1925) has been recently considered in *Colquitt v. Colquitt* (3) and *M. v. M.* (4). In *Colquitt v. Colquitt* (3) the Divisional Court approved *M. v. M.* (4) and disapproved *Bednall v. Bednall* (5), *Green v. Green* (6) and *Jones v. Jones* (7), in so far as those cases concerned children in respect of whom a formal declaration of legitimacy had not been obtained. In *M. v. M.* Denning, J., stated (8) that parenthood, and not legitimacy, was the test under s. 193, and although the Divisional Court did not approve of this observation (9), saying that it went too far, the question before that court was the meaning of "children of the marriage", and full argument on the true meaning of the section was not therefore required. It is submitted that in view of the distinctive wording of the section and what is, it is submitted, its *prima facie* meaning, Denning, J., who placed reliance on *Langworthy v. Langworthy* (10), was right. [He referred to the arguments of the Attorney-General in *Green v. Green* (6) and *Jones v. Jones* (7).]

Custody may be given of an illegitimate child: see, for example, *Jackson v. Jackson* (11) and *Clarke (otherwise Talbott) v. Clarke* (12).

[BARNARD, J. But the section makes specific provision for custody in nullity proceedings.]

A broad interpretation is given to the word "custody" in other proceedings. [He cited *Barnado v. McHugh* (13).]

The husband did not contest the proceedings, but wrote to say that he admitted that he was the father of the child.

Cur. adv. vult.

(3) [1948] P. 19.

(4) [1946] P. 31.

(5) [1927] P. 225.

(6) [1929] P. 101.

(7) (1929) 45 T. L. R. 292.

(8) [1946] P. 31, 33, 35.

(9) [1948] P. 19, 24.

(10) (1886) 11 P. D. 85.

(11) [1908] P. 308.

(12) [1942] W. N. 228; 112 L. J. (P.) 41.

(13) [1891] A. C. 388.

June 22. BARNARD, J., reading his judgment, stated the facts, read s. 26, sub-s. 1, of the Matrimonial Causes Act, 1950, and continued:—Counsel emphasized the difference between the wording of s. 26, sub-s. 1, of the Matrimonial Causes Act, 1950, and the wording of s. 5 (b) of the Summary Jurisdiction (Married Women) Act, 1895, which gives the court jurisdiction, inter alia, to make an order that the legal custody of any child of the marriage between the applicant and the husband, while under the age of sixteen years, be committed to the applicant. He submitted that under the Matrimonial Causes Act, 1950, the only test to apply was parenthood, and in support of his argument he quoted some dicta of Denning, J., in *M. v. M.* (14). In that case Denning, J., decided that the section, which was then s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, applied to a child legitimated by the subsequent marriage of the parents and refused to follow *Bednall v. Bednall* (15), *Green v. Green* (16) and *Jones v. Jones* (17).

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In the course of his judgment, however, Denning, J., said (18):
 “The powers conferred by s. 193 are not confined to children of
 “the marriage but apply to ‘children, the marriage of whose
 “‘parents is the subject of the proceedings’, as it is put in one
 “place, or the ‘children of the petitioner and respondent’, as it
 “is put in another place. Both those expressions seem to me
 “to make parenthood the test, not legitimacy. The difficulty
 “arises from the cases of *Bednall v. Bednall* (15), *Green v.*
 “*Green* (16) and *Jones v. Jones* (17), where it was held that
 “an order for custody can only be made in respect of legitimate
 “children. It is to be noticed, however, that s. 193 applies not
 “only to proceedings for divorce, but also to proceedings for
 “nullity of marriage, and in *Langworthy v. Langworthy* (19) (a
 “nullity case where there never was a valid marriage), the Court
 “of Appeal held that the section enabled the children of the
 “union to be provided for. That decision was not cited in any
 “of the three cases, and it seems to me to show that the test
 “under s. 193 is parenthood, not legitimacy”.

In *Langworthy v. Langworthy* (19), referred to by Denning, J., it was held that the court had jurisdiction to order a provision to be made for the child of the marriage which the court had declared void, because the court was expressly given such

(14) [1946] P. 31.

(15) [1927] P. 225.

(16) [1929] P. 101.

(17) 45 T. L. R. 292.

(18) [1946] P. 31, 32.

(19) 11 P. D. 85.

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jurisdiction, namely in nullity proceedings, by s. 35 of the Matrimonial Causes Act, 1857.

Section 35 of the Matrimonial Causes Act, 1857, as amended by s. 4 of the Matrimonial Causes Act, 1859, was replaced by s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, which was in its turn replaced by s. 26 of the Matrimonial Causes Act, 1950; the phraseology of all three sections is substantially the same.

In *Colquitt v. Colquitt* (20) Lord Merriman, P., in giving the considered judgment of the Divisional Court to the effect that a legitimated child is a child of the marriage within the meaning of the Summary Jurisdiction Acts, approved the decision of Denning, J., in *M. v. M.* (21), but adversely criticized his statement that parenthood was the test and not legitimacy. That part of the judgment reads as follows (22): "In *M. v. M.* (21) "Denning, J., placed great reliance on the decision of the Court "of Appeal in *Langworthy v. Langworthy* (19), which is referred "to as showing that the test under s. 193 of the Supreme Court "of Judicature (Consolidation) Act, 1925, is 'parenthood, not "'legitimacy'. That case established that a child of the union "who is rendered illegitimate by the annulment of the marriage "can be dealt with under s. 193, for the very reason, as is pointed "out by Cotton and Fry, L.JJ., that the section expressly refers "to nullity proceedings. But in relation to proceedings for "divorce, at any rate, we think that to say that parenthood, not "legitimacy, is the test, goes too far. It cannot, in our opinion, "be suggested that although the parenthood is undisputed, an "illegitimate child who cannot be legitimated is the subject of "custody proceedings under s. 193 on the divorce of the spouses "who are, in fact, his parents. But we agree with Denning, J., "that the fact that the wording of s. 193 is wide enough to cover "the case of a child of the union rendered illegitimate by the "annulment of the marriage of his parents, tends to support the "view that in divorce proceedings it is also wide enough to include "a child who has been rendered legitimate".

Prima facie, the term child or children in a statute means legitimate child or children, but a wider meaning may be given where that meaning is more consonant with the object of the statute: see *Woolwich Union v. Fulham Parish* (23). Following this decision, MacKinnon, J., in *Morris v. Britannic Assurance*

(19) 11 P. D. 85.

(22) [1948] P. 19, 23, 24.

(20) [1948] P. 19.

(23) [1906] 2 K. B. 240.

(21) [1946] P. 31.

Co. Ltd. (24), held that the term "child" used in the Industrial Insurance Act, 1923, included illegitimate children because the nature of the obligation as to which insurance was desired was the same whether the child was legitimate or illegitimate.

But in many statutes, which are applicable to children, such as the Unemployment Act, 1934, the Law Reform (Miscellaneous Provisions) Act, 1934, the Unemployment Insurance Act, 1935, the Widows' Orphans' and Old Age Contributory Pensions Act, 1936, the Finance Act, 1936, the Workmen's Compensation (Supplementary Allowances) Act, 1940, and the Pensions Increase Act, 1944, there are sections which specifically define the expression "child" as including an illegitimate child for the purpose of that particular statute. There is no definition of the expression "child" either in the Matrimonial Causes Act, 1950, or in the appropriate Acts which preceded it. I have, therefore, to ask myself what was the object of the statute.

The preamble to the Matrimonial Causes Act, 1857, makes it clear that its object was to constitute a court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage. The provisions of the Act also give the court jurisdiction in matters ancillary to the dissolution of the marriage, to enable the court to adjust matters as between the parties to the marriage, in the light of its dissolution. The statute is concerned with marriage, and I cannot think that the legislature had anything but the children of the marriage in mind. Both the Legitimacy Act, 1926, and the Adoption Act, 1926, give the legitimated child and the adopted child respectively the status of a child of the marriage, with some exceptions which are immaterial to the question I have to consider.

I agree entirely with the view expressed by the Divisional Court in *Colquitt v. Colquitt* (25), and with what Lord Merivale, P., said in *Green v. Green* (26), in referring to s. 35 of the Matrimonial Causes Act, 1857, and to s. 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, that "children" in these enactments mean legitimate children.

I am concerned solely with a claim for legal custody; the petitioner, already, has the de facto custody, and, so far as maintenance is concerned, the fact that a man marries a woman with a young child, whether he be the father of the child or not, is a

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(24) [1931] 2 K. B. 125.

(25) [1948] P. 19.

(26) [1929] P. 101, 104.

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matter which the court would take into consideration in awarding the woman maintenance, after a dissolution of the marriage, assuming the child was still under age and needing support.

This application must be dismissed.

Application dismissed.

Solicitor: *J. A. H. Powell; Law Society, Divorce Department.*

J. B. G.

PUGH v. PUGH.

1951
 July 9, 10,
 11, 12.

Pearce, J.

Husband and Wife—Nullity—Nonage—Husband domiciled in England—Marriage to foreigner abroad—Wife under sixteen—Law applicable—Age of Marriage Act, 1929 (19 & 20 Geo. 5, c. 36), ss. 1, 3.

The effect of the Age of Marriage Act, 1929, is extra-territorial, and the Act affects the capacity to contract marriage in all persons domiciled in this country wherever the marriage may be celebrated.

Where, therefore, an Englishman domiciled in England married in Austria a girl of fifteen years of Hungarian birth:—

Held, that the marriage was void, notwithstanding that it would have been valid by either Hungarian or Austrian law. *Brook v. Brook* (1861) 9 H. L. C. 193, applied.

PETITION for a decree of nullity or, alternatively, divorce.

The following statement of the facts is taken from the judgment:—The wife had a Hungarian domicile of origin, being born in Hungary of Hungarian parents. In 1945 she left Hungary with her parents to escape from the Russian advance and went to Austria. She there met her husband, who was a serving British officer.

On October 19, 1946, they went through a Roman Catholic ceremony of marriage at Maria Wort in Austria. On October 21, 1946, they went through a civil ceremony of marriage at the equivalent of a register office in the same town. The wife was then fifteen years of age. They lived together in Austria and Germany at places where the husband was stationed. It was, at all material times, the husband's intention to return after his service abroad and settle down with his wife in England. On October 10, 1948, a child was born; in June, 1950, they paid a

short visit to England, and in October, 1950, they came to England permanently. Owing to their differences they ceased to live together in October, 1950; but both remained in England.

The wife presented a petition for nullity on the ground of nonage, and sought, in the alternative, a decree of divorce on the ground of her husband's cruelty. The husband cross-pleaded for a divorce and damages against the co-respondent on the ground of the wife's adultery. Those matters were stood over until the issue on the question of nullity was decided.

J. E. S. Simon, K.C., and *Basil Garland* for the wife.

G. C. Tyndale, K.C., and *H. E. Park* for the husband.

The arguments sufficiently appear from the judgment.

PEARCE, J., stated the facts as above set out, and continued:—There is little, if any, dispute as to the effect of Hungarian and Austrian law on the admitted facts. If Hungarian law alone is applicable without reference to English law, the marriage was voidable owing to the fact of the wife then being under sixteen years of age; but as she did not avoid it before her seventeenth birthday it became a valid marriage. If Austrian law alone is applicable without reference to English law, the marriage was valid. If English law is applicable, the marriage was void by the Age of Marriage Act, 1929, s. 1,* which provides: "A marriage between two persons either of whom is under the age of sixteen shall be void".

Mr. Simon, for the wife, makes two submissions. The first is this:—The Age of Marriage Act, 1929, applies to the husband as a British subject with an English domicile, wherever he may marry. Its effect is extra-territorial and is not merely confined to marriages in the United Kingdom. Therefore it makes this marriage void. His second submission is this:—The validity of such a marriage as this has to be tested as to its essentials by the law of the country of the husband's domicile, or alternatively (see *De Reneville v. De Reneville* (1)), by the law of the country of the proposed matrimonial home. On either alternative that is English law, and by English law the Age of Marriage Act, 1929, makes such a marriage void. If either of those submissions is correct the wife is entitled to a decree of

* See now the Marriage Act, 1949, s. 2 and s. 80, sub-s. 2.

(1) [1948] P. 100.

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nullity. Mr. Tyndale contends that both submissions are incorrect and that the marriage is valid.

The first point depends on an interpretation of the statute itself. In Maxwell on the Interpretation of Statutes (9th ed.), p. 148, the law is conveniently summarized in these words: "Another general presumption is that the legislature does not intend to exceed its jurisdiction. Primarily, the legislation of a country is territorial. The general rule is, that 'extra territorium jus dicenti impune non paretur. The laws of a nation apply to all its subjects and to all things and acts within its territories. They apply also to all foreigners within its territories (not privileged like sovereigns and ambassadors) as regards criminal, police, and, indeed, all other matters except some questions of personal status or capacity, in which, by the comity of nations, the law of their own country, or the *lex loci actus* or *contractus* applies. This does not, indeed, comprise the whole of the legitimate jurisdiction of a State, for it has a right to impose its legislation on its subjects, natural or naturalized, in every part of the world; and on such matters as personal status or capacity it is understood always to do so, but, with that exception, in the absence of an intention clearly expressed or to be inferred either from its language, or from the object, subject-matter, or history of the enactment, the presumption is that parliament does not design its statutes to operate on its subjects beyond the territorial limits of the United Kingdom. They are, therefore, to be read, usually, as if words to that effect had been inserted in them".

In *Lady Rhondda's Claim* (2) Lord Birkenhead, L.C., said: "A long stream of cases has established that general words are to be construed so as, in an old phrase, 'to pursue the intent of the makers of statutes': *Stradling v. Morgan* (3), and so as to import all those implied exceptions which arise from a close consideration of the mischiefs sought to be remedied and of the state of the law at the moment, when the statute was passed".

The Age of Marriage Act, 1929, contains no provision that its operation is or is not to extend to marriages beyond the sea. Section 3, sub-s. 2,* provides that it is not to apply to Northern Ireland. It is urged by Mr. Tyndale that that points to its not being intended to apply to marriages contracted elsewhere than in Great Britain. But in *In re Priest* (4) Bennett, J., held that

* See now the Marriage Act, 1949, s. 2 and s. 80, sub-s. 2.

(2) [1922] 2 A. C. 339, 369.

(3) (1560) 1 Plow. 199.

(4) [1944] Ch. 58.

s. 35 of the Wills Act, 1837, which provides that that Act shall not extend to Scotland, does not preclude the Act from applying to a will made in Scotland by a testator domiciled in England. Section 3, sub-s. 2, of the Age of Marriage Act, 1929, is in my view no guide to the present problem.

The Royal Marriage Act, 1772, does not expressly say whether or not it is intended to apply beyond the seas. It was held in the *Sussex Peerage* case (5) that that Act extended to annul any marriage contracted in violation of its provisions wherever it may have been solemnized either within the realm of England or without. Tindal, C.J., giving the judgment of the judges, said (6): "The statute does not enact an incapacity to contract matrimony within one particular country and district or another, but to contract matrimony generally, and in the abstract. It is an incapacity attaching itself to the person of A.B., which he carries with him wherever he goes. But as a marriage once duly contracted in any country will be a valid marriage all the world over, the incapacity to contract a marriage at Rome is clearly within the prohibitory words of the statute as the incapacity to contract in England. So again, as to the second or annulling branch of the enactment, 'that every marriage without such consent shall be null and void'; the words employed are general, or, more properly, universal; and cannot be satisfied in their plain, literal, ordinary meaning, unless they are held to extend to all marriages, in whatever part of the world they may have been contracted or celebrated". Later he said (7): "It was contended in the course of the argument at your Lordships' Bar, that an Act of the English legislature can have no binding force beyond, or out of, the realm of England; and if by this is meant only, that it can have no obligatory force upon the subjects of another state, the position is no doubt correct in its full extent; but it is equally certain that an Act of the legislature will bind the subjects of this realm, both within the kingdom and without, if such was its intention".

The intention of the Royal Marriage Act, 1772, was wholly different from that of the Age of Marriage Act, 1929. That Act dealt with designated persons. The Age of Marriage Act deals with the community. The difference is one of degree, but it is so great that I do not think that much help can be obtained from a consideration of that case.

(5) (1844) 11 Cl. & Fin. 85.

(7) Ibid. 146.

(6) Ibid. 144.

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Lord Lyndhurst's Act, 1835 (5 & 6 Will. 4, c. 54), provided that marriages between persons within prohibited degrees of consanguinity or affinity shall be absolutely null and void for all purposes whatsoever. It does not expressly say whether or not it applies to marriages beyond the seas. It contains a proviso that nothing in the Act shall be construed to extend to Scotland. That Act has been held, in *Brook v. Brook* (8) and *Mette v. Mette* (9), to apply to marriages celebrated in Denmark and Germany respectively.

Those cases are also relevant to Mr. Simon's second submission which is closely related to his first but distinct from it. In *Brook v. Brook* (10) it was held that "the law of the country" in which a marriage is solemnized cannot give validity to a "marriage prohibited by the laws of the country of the domicile" and allegiance of the contracting parties. Therefore, a marriage "celebrated during a temporary residence in Denmark, between an English widower and the sister of his deceased wife, being null and void by Lord Lyndhurst's Act, 1835, is not valid, although by the law of Denmark such marriages are permitted".

Sir Cresswell Cresswell said (11): "I have therefore come to the conclusion that a marriage, contracted by the subjects of a country in which they are domiciled, in another country is not to be held valid, if by contracting it the laws of their own country are violated. Another question remains to be considered, viz., whether the 2nd section of the statute 5 & 6 William 4, c. 54 [Lord Lyndhurst's Act], taken by itself, is so framed as to be binding on all English subjects wherever they may be; or, in other words, whether it is personal and accompanies the person of an English subject into foreign lands. It is in these words: 'Be it further enacted that all marriages which shall hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity shall be absolutely null and void to all intents and purposes whatsoever'. The words in their common and ordinary sense would extend to marriages wherever celebrated; otherwise some only and not all would be rendered void. It is a statute affecting persons, and may be read as if it had been: 'If hereafter any persons (that is British subjects) within the prohibited degrees contract marriages, all such marriages shall be void'. A law framed in such

(8) (1857-8) 3 Sm. & G. 481;
(1861), 9 H. L. C. 193.

(9) (1859) 1 Sw. & Tr. 416.

(10) 3 Sm. & G. 481.

(11) Ibid. 522.

“ terms would attach upon the persons of British subjects, and accompany them to all parts of the world ”. Again he said (12): “ This statute does not enact an incapacity to contract matrimony within the prohibited degrees within one particular country and district or another, but to contract such marriage generally. The object of the statute was to put an end to all such marriages between English subjects for the future, and cannot be satisfied by any narrower construction ”.

Sir John Stuart, V.-C., in the same case, said (13): “ The purpose of the legislature was to annul for the future all marriages between persons within the prohibited degrees. . . . These words, clear and unambiguous, prevent the relation of husband and wife from subsisting between any subjects of the realm of England within the prohibited degrees. Scotland is expressly excepted from the operation of the Act. But the words ‘ all marriages ’ are not in any other respect qualified or restricted by anything in the context. Lord Coke says ‘ Generale dictum generaliter est ‘ intelligendum ’ (2 Instit. 21). Unless the words mean all marriages wheresoever celebrated, the ordinary sense and meaning of the word ‘ all ’ is not given to it; for if marriages elsewhere celebrated are not included, the words ‘ all marriages ’ must be read as meaning that some marriages are not included in the words ‘ all marriages ’, which would be absurd. The object of the Act is to prevent the relation of husband and wife from subsisting between certain persons who are subjects of the Crown of England and domiciled in England. But that object would be defeated if, by any marriage celebrated anywhere between two subjects of the Crown of England and domiciled in England, this prohibited relation were allowed to subsist. As part of the municipal law of England this statute has its operation within the territory of England upon all English subjects, and upon all marriages between English subjects who are within the prohibited degrees ”. And he said later (14): “ This incapacity is personal and, being impressed upon the persons by the law of their own country, cannot be cast off or removed by mere change of place. It is a personal quality which, according to Huber and other jurists, travels round everywhere with the persons; inseparable from them as their shadows ”.

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(12) 3 Sm. & G. 481, 523.

(14) Ibid. 527.

(13) Ibid. 525.

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The judgment in that case was upheld by the House of Lords (15). Lord Campbell, L.C., said (16): "There can be no doubt of the general rule, that 'a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere'. But while the forms of entering into the contract of marriage are to be regulated by the *lex loci contractus*, the law of the country in which it is celebrated, the essentials of the contract depend upon the *lex domicilii*, the law of the country in which the parties are domiciled at the time of the marriage, and in which the matrimonial residence is contemplated. Although the forms of celebrating the foreign marriage may be different from those required by the law of the country of domicile, the marriage may be good everywhere. But if the contract of marriage is such, in essentials, as to be contrary to the law of the country of domicile, and it is declared void by that law, it is to be regarded as void in the country of domicile, though not contrary to the law of the country in which it was celebrated". Later, he said (17): "It is quite obvious that no civilized state can allow its domiciled subjects or citizens, by making a temporary visit to a foreign country to enter into a contract, to be performed in the place of domicile, if the contract is forbidden by the law of the place of domicile as contrary to religion, or morality, or to any of its fundamental institutions". And dealing with an American case he said (18): "... and he" (the judge) "took the distinction between cases where the absolute prohibition of the marriage is forbidden on mere motives of policy, and where the marriage is prohibited as being contrary to religion on the ground of incest. I myself must deny the distinction. If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier and entering into another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and immediately returning to their own state, to insist on their marriage being recognized as lawful".

That passage is of some importance since a distinction was sought to be drawn before me between Lord Lyndhurst's Act, which is founded on Christian doctrine, and the Age of Marriage Act, which is founded on social and moral grounds.

(15) 9 H. L. C. 193.

(16) Ibid. 207.

(17) Ibid. 212.

(18) Ibid. 219.

Lord Cranworth said (19): "The conclusion at which I have arrived is the same as that which my noble and learned friend on the Woolsack has come to, namely, that though in the case of marriages celebrated abroad the *lex loci contractus* must quoad solemnitates determine the validity of the contract, yet no law but our own can decide whether the contract is or is not one which the parties to it, being subjects of Her Majesty domiciled in this country, might lawfully make. There can be no doubt as to the power of every country to make laws regulating the marriage of its own subjects, to declare who may marry, how they may marry, and what shall be the legal consequences of their marrying. . . . The rule in this country, and I believe generally in all countries is, that the marriage, if good in the country where it was contracted, is good everywhere, subject, however, to some qualifications, one of them being that the marriage is not a marriage prohibited by the laws of the country to which the parties contracting matrimony belong. The real question therefore, is, whether the law of this country, by which the marriage now under consideration would certainly have been void if celebrated in England, extends to English subjects casually being in Denmark? I think it does; of the power of the legislature to determine what shall be the legal consequences of the acts of its own subjects done abroad, there can be no doubt, and whether the operation of any particular enactment is intended to be confined to acts done within the limits of this country, or to be of universal application, must be matter of construction, looking to the language used and the nature and objects of the law".

Lord St. Leonards said (20): "This case, then, is reduced to the simple question, Is the marriage valid in this country because it was contracted in Denmark, where a marriage with a deceased wife's sister is valid? This depends upon two questions, either of which, if adverse to the appellants, would be fatal to the validity of the marriage, namely, first, will our courts admit the validity of a marriage abroad by an English subject domiciled here with his deceased wife's sister, because the marriage is valid in the country where it was contracted? Secondly, is such a marriage struck at by 5 & 6 William 4, c. 54 [Lord Lyndhurst's Act]? I think that the marriage has no validity in this country on the first ground, for by our law such a marriage is forbidden, as contrary, in our

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(19) 9 H. L. C. 193, 223-4.

(20) Ibid. 234-5.

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“view, to God’s law. The objection that Parliament gave validity to such marriages already had, in cases of affinity, is no reason why, when we have in future carefully made all such marriages absolutely void, we should admit their validity in favour of the law of a foreign country. The learned judge who assisted the learned Vice-Chancellor in the court below, came to the conclusion, after an elaborate review of the authorities, that a marriage contracted by the subjects of one country, in which they are domiciled, in another country, is not to be held valid, if, by contracting it, the laws of their own country are violated. This proposition is more extensive than the case before us requires us to act upon, but I do not dissent from it. I shall not, however, dwell upon this point, because I think that upon the second point the marriage is clearly invalid”.

Lord Wensleydale said (21): “I think the construction put upon this as a personal Act is wrong. I do not think the purpose of the statute was to put an end to such marriages by British subjects in any part of the world. Its object was only to make absolutely void thereafter all marriages in this realm between persons within the prohibited degrees of consanguinity or affinity which were previously voidable”.

That passage is of importance for this reason. Mr. Tyndale for the husband argues that there is only one point here, namely whether the Age of Marriage Act was intended to affect marriages outside the realm, and if his contention is right on that one point, and the Act is not extra-territorial, the marriage is valid. Lord Wensleydale clearly admits the existence of two points since although he held that Lord Lyndhurst’s Act was not extra-territorial, he came to the conclusion that the marriage was void on the grounds put forward in this case by Mr. Simon on his second submission.

In *Mette v. Mette* (22) a native of Germany came to England, was married in this country and obtained naturalization. His wife died. He then married at Frankfurt his deceased wife’s sister who was domiciled in Frankfurt. It was held that the principle laid down in *Brook v. Brook* (23) as to the disabilities of a native born English subject to contract such a marriage applied equally to a naturalized subject; that though, by the law of Frankfurt, such a marriage would have been valid, yet the

(21) 9 H. L. C. 193, 240.

(22) 1 Sw. & Tr. 416.

(23) 3 Sm. & G. 481; 9 H. L. C.

193.

disability of either party to the contract would invalidate the marriage. Sir Cresswell Cresswell said (24): "There could be no valid contract unless each was competent to contract with the other. The question rests upon the effect of domicile and naturalization. . . . It appears to me, therefore, that at the time of the second marriage he, as a natural liege subject, owed obedience to the statute 5 & 6 William 4, c. 54, and could not contract a marriage in contravention of it".

It was sought to distinguish the cases under Lord Lyndhurst's Act from the case before me by the fact that where Lord Lyndhurst's Act refers to "all marriages" and provides that they shall be "absolutely null and void for all purposes whatever", the Age of Marriage Act, 1929, in less forceful language merely refers to "a marriage" and says simply that it shall be "void". In my view the language of the latter Act in its context is just as effective.

Sir Eric Beckett, in an article in the British Year Book of International Law, 1934, at p. 64 (of which both sides made use in argument), canvasses the question whether this Act is (1.) purely territorial in application, making any marriage celebrated in the United Kingdom void if one of the parties is under sixteen, irrespective of the personal law of the parties; or (2.) purely personal in application, that is to say, not applying to such a marriage celebrated in the United Kingdom if the personal law of the parties allows it, but laying down a rule as to the personal status and capacity of any subject whose personal law is English or Scottish and applying to any marriage of such persons wherever celebrated; or (3.) both personal and territorial in its application.

It is urged on me that the statute is ambiguous and also (rightly in my opinion) that if I am in doubt as to its meaning the marriage is to be deemed valid and the wife has failed to make out her case.

But is the statute ambiguous? The words are clear and general. It must be remembered that personal status and capacity to marry are considered to be the concern of the country of domicile. It is right and reasonable that the country of domicile should (as it did by Lord Lyndhurst's Act) from time to time vary and affect the personal status of its subjects and their capacity to marry as changing religious, moral, and social conditions may demand.

I see no reason to put upon the words any other limitation than the obvious one that they are not intended to apply to

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marriages abroad of persons who are not domiciled here and who are not the concern of or subject to the laws of Parliament.

In *Heydon's* case in 1584 (25) the Barons of the Exchequer resolved: "that for the sure interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered: First, what was the common law before the making of the Act. Second, what was the mischief and defect for which the common law did not provide. Third, what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And fourth, the true reason of the remedy; and then the office of all the judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico".

It is helpful to consider this case in the light of those resolutions. The common law before the Age of Marriage Act, 1929, was this: By canon law which continued after and in spite of the Reformation a boy of fourteen years could marry a girl of twelve. The "mischief and defect for which the common law did not provide" was this: According to modern thought it is considered socially and morally wrong that persons of an age, at which we now believe them to be immature and provide for their education, should have the stresses, responsibilities and sexual freedom of marriage and the physical strain of childbirth. Child marriages are by common consent believed to be bad for the participants and bad for the institution of marriage. Acts making carnal knowledge of young girls an offence are an indication of modern views on this subject. The remedy that "the Parliament has resolved" for this mischief and defect is to make marriages void where either of the parties is under sixteen years of age.

To curtail the general words of the Act so that a person can evade its provisions by merely going abroad and entering into a marriage where one of the parties is under sixteen in some country like Northern Ireland where canon law still prevails, and then returning to live in this country after the marriage, seems to me to be encouraging rather than suppressing "subtle inventions" and evasions for the continuance of the mischief".

Parliament must be deemed to have known the effect of *Brook v. Brook* (26). In my view it was by the Age of Marriage Act, 1929, deliberately legislating on a matter that is its own peculiar concern, namely, the personal status of its subjects and their capacity to contract marriage. This Act was intended, as was Lord Lyndhurst's Act, to affect that capacity in all persons domiciled in the United Kingdom wherever the marriage might be celebrated.

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➤ I come now to the second submission. So far as the form of marriage is concerned it is clearly established that the law of the place of the marriage is the effective law; but so far as concerns the essential validity of a marriage the position is different.

In *Conway (orse. Beazley) v. Beazley* (27), as early as 1831, Dr. Lushington held that "The lex loci contractus as to marriage will not prevail when either of the contracting parties is under a legal incapacity by the law of the domicile; and therefore a second marriage, had in Scotland on a Scotch divorce a vinculo from an English marriage between parties domiciled in England at the times of such marriages and divorce, is null". He said (28): "Undoubtedly, questions of marriage are prima facie to be judged of by the law of the country where they are solemnized; but I am of opinion that, before considering the second marriage, I must ascertain the capacity of the parties to contract. If both the parties, being at the respective times of the first marriage and of the divorce domiciled English subjects, were by the law of England prohibited by a personal incapacity from entering into such a contract, I must apply the rule of that law".

I have already considered *Brook v. Brook* (29) and *Mette v. Mette* (30), which show that the law of domicile is the law which regulates the essentials of the marriage and that Lord Lyndhurst's Act, as part of that law, in those cases avoided the marriages.

In *Sottomayor v. De Barros* (31) it was held that, the parties being by the law of the country of their domicile under a personal disability to contract marriage, their marriage ought to be declared null and void. In delivering the judgment of the court, Cotton, L.J., said (32): "But it is a well-recognized principle of law that the question of personal capacity to enter into any contract

(26) 3 Sm. & G. 481; 9 H. L. C. 193.

(27) 3 Hagg. Ecc. 639.

(28) Ibid. 652.

(29) 3 Sm. & G. 481; 9 H. L. C. 193.

(30) 1 Sw. & Tr. 416.

(31) (1877) 3 P. D. 1.

(32) Ibid. 5.

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In *In re De Wilton, De Wilton v. Montefiore* (33) it was decided that the capacity of persons professing the Jewish religion who were also domiciled British subjects to contract marriage is regulated by the law of England. Therefore, where a marriage was solemnized abroad according to Jewish rites between a niece and her maternal uncle, both the contracting parties being at the time of the solemnization domiciled British subjects and adherents of the Jewish faith, although the marriage was valid both by Jewish law and by the law of Wiesbaden where the marriage took place, it was held that the marriage was invalid.

In *In re Paine* (34) a lady while domiciled in England married her deceased sister's husband, who was a German subject. The marriage took place in Germany and was in accordance with the laws of Germany, by which such a marriage was valid. Bennett, J., held that according to English law the marriage was invalid, because by English law the lady had not the capacity to contract it.

In view of those authorities it is clear that this marriage was not valid since by the law of the husband's domicile it was a marriage into which he could not lawfully enter.

On both submissions put forward by counsel for the wife she is entitled to succeed. There will be a decree of nullity on the wife's petition.

Decree of nullity granted.

Solicitors: *Gordon Dadds & Co.; Ernest Long & Co.*

J. B. G.

(33) [1900] 2 Ch. 481.

(34) [1940] Ch. 46.

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